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IN THE

Supreme Court of the United States

October Term, 1988

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NEW YORK SHIPPING ASSOCIATION, INC.; COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS; ATLANTIC CONTAINER LINE, LTD.; OOCL-UK, LTD.; HAPAG-LLOYD AKTIENGESELLSCHAFT; "ITALIA" S.P.A.N.; NEDLLOYD LINES, B.V.; PUERTO RICO MARITIME SHIPPING AUTHORITY; TRANS FREIGHT LINES, INC.; P&O CONTAINERS (TFL) LIMITED; and SEA-LAND SERVICE, INC.,

Petitioners,

v.

FEDERAL MARITIME COMMISSION; UNITED STATES OF AMERICA; AMERICAN TRUCKING ASSOCIATIONS, INC.; AMERICAN WAREHOUSEMEN'S ASSOCIATION; NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC.; FLORIDA CUSTOM BROKERS AND FORWARDERS ASSOCIATION; INTERNATIONAL ASSOCIATION OF NVOCCS; and WEST GULF MARITIME ASSOCIATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Questions Presented

This case presents significant questions never previously decided by this Court relating to the reconciliation of federal labor and shipping regimes—questions which this court observed in an earlier, related case "present difficult and complex problems which are not properly before us." *NLRB* v. *International Longshoremen's Association*, 447 U.S. 490, 512 (1980); *see also NLRB* v. *International Longshoremen's Association*, 473 U.S. 61, 70 n.10 (1985). These questions are:

1. May a federal agency in determining a substantive violation of its own organic statute refuse to consider and thereby frustrate the purposes and policies of another federal statute?

2. Is the preservation of work pursuant to valid provisions of a collective bargaining agreement a substantive right protected by national labor law?

3. May the Federal Maritime Commission in applying an "unreasonableness" standard to determine the legality under federal shipping law of work preservation provisions upheld by this Court under federal labor law refuse to consider the labor purposes of the agreement and the congressional goals and policies of national labor law?

Parties

All parties in the court of appeals appear in the caption with the exception of United States Lines, Inc., a petitioner in the court of appeals, which is the debtor in a pending proceeding under Chapter 11 of the Bankruptcy Act. *In re United States Lines*, No. 86-B-12240 (Bankr. S.D.N.Y. filed Nov. 24, 1986).

In accordance with Sup. Ct. Rule 28.1, it should be noted that none of the petitioners has a corporate parent, subsidiary or affiliate with the following exceptions:

- Atlantic Container Line, Ltd. is affiliated with Atlantic Container Line BV and has a non-wholly-owned subsidiary, Container Finance (Bermuda) Limited.
- As of 1981 OOCL-UK, Ltd.* was jointly owned by Canadian Pacific, Ltd., Compagnie Maritime Belge S.A. and Orient Overseas (Holdings) Limited, three publicly-owned corporations which were financially responsible for its winding down. Since January 1, 1984, the container transport service of OOCL-UK, Ltd. has been owned and operated by a wholly-owned subsidiary of Orient Overseas (Holdings) Limited.
- P&O Containers (TFL) Limited** is a wholly-owned subsidiary of P&O Containers Limited, which in turn is a subsidiary of a publicly owned corporation, Peninsular & Oriental Steam Navigation Company.
- Sea-Land Service, Inc. is a subsidiary of Sea-Land Corporation, which in turn is a subsidiary of a publicly-owned corporation, CSX Corporation.

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* In the court of appeals OOCL-UK, Ltd. appeared under its former name, Dart Containerline Company, Limited.

** In the court of appeals P&O Containers (TFL) Limited appeared under its former name, P & OCL (Trans Freight Lines) Limited.

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INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NEW YORK SHIPPING ASSOCIATION, INC.; COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS; ATLANTIC CONTAINER LINE, LTD.; OOCL-UK, LTD.; HAPAG-LLOYD AKTIENGESELLSCHAFT; "ITALIA" S.P.A.N.; NEDLLOYD LINES, B.V.; PUERTO RICO MARITIME SHIPPING AUTHORITY; TRANS FREIGHT LINES, INC.; P&O CONTAINERS (TFL) LIMITED; and SEA-LAND SERVICE, INC.,

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FEDERAL MARITIME COMMISSION; UNITED STATES OF AMERICA; AMERICAN TRUCKING ASSOCIATIONS, INC.; AMERICAN WAREHOUSEMEN'S ASSOCIATION; NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC.; FLORIDA CUSTOM BROKERS AND FORWARDERS ASSOCIATION; INTERNATIONAL ASSOCIATION OF NVOCCS; and WEST GULF MARITIME ASSOCIATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

This case concerns the right of longshoremen to preserve work in the face of technological change. On the basis of a discretionary standard under federal shipping law the Federal Mari-

time Commission invalidated the Rules on Containers, the collectively bargained response to the technological displacement of longshore work occasioned by the increasing use in the shipping industry of automated cargo handling techniques. After more than fifteen years of litigation before the National Labor Relations Board ("NLRB"), eight district courts, and six courts of appeals the Supreme Court upheld these same Rules as lawful work preservation provisions under federal labor law. *NLRB* v. *International Longshoremen's Association* (*ILA-II*), 473 U.S. 61 (1985); *see also NLRB* v. *International Longshoremen's Association* (*ILA-I*), 447 U.S. 490 (1980). Nonetheless, the Federal Maritime Commission ("FMC") affirmed by the court of appeals refused to take labor considerations into account in adjudging the reasonableness of the Rules under federal shipping law. In light of the importance of defining the scope of an agency's duty to reconcile overlapping federal statutory policies, petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Opinions Below

The opinion of the court of appeals, which is reported at 854 F.2d 1338, is reproduced as Appendix A in the separately bound appendix to this petition (App. A. at 1a-69a).[1] The FMC's decision (App. B. at 70a-201a) appears unofficially at 24 Shpg. Reg. Rep. (P&F) 411 (1987). The Commission had reversed the initial decision of its chief administrative law judge (App. C. at 202a-268a), which is reported at 22 Shpg. Reg. Rep. (P&F) 1660 (1985).

Jurisdiction

The judgment of the court of appeals (App. D at 269a) was entered on August 9, 1988. This petition is being filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

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[1] References are to the pages of the separately bound appendix.

Statutes

The relevant statutes are sections 14 Fourth, 16 First, 17 and 18(a) of the Shipping Act, 1916, 46 U.S.C. §§ 812 Fourth, 815 First, 816, and 817(a) (1982); section 4 of the Intercoastal Shipping Act, 1933, 46 U.S.C. § 845(a) (1982); sections 10(b)(6)(C), 10(b)(11) - (12), and 10(d)(1) of the Shipping Act of 1984, 46 U.S.C. app. §§ 1709(b)(6)(C), 1709(b)(11)-(12), and 1709(d)(1) (Supp. III 1986); and section 5 of the Maritime Labor Agreements Act, Pub. L. No. 96-325, 94 Stat. 1021 (1980), *codified* at 46 U.S.C. § 841c (1982). The complete texts of these statutes are reproduced in the separately bound appendix (App. E at 270a-274a).

Statement of the Case

The Rules on Containers are a work preservation agreement forged during the turbulent history of a labor struggle that has raged in the shipping industry without interruption for the past 30 years. Automation and its job-eroding effects precipitated lengthy strikes in 1959, 1962, 1964, 1968, 1971 and 1977. The focus of contention has been the employers'[2] increasingly prevalent use of large metal cargo containers to increase the efficiency of shipping operations by radically decreasing the need for the traditional piece-by-piece loading and unloading of oceanborne cargo by longshoremen (App. A at 7a-8a; App. B at 76a-81a; App. C at 206a).

After a decade of labor strife and a series of inadequate contractual solutions the dispute reached a critical juncture in the 1968 negotiations because of the introduction of full container operations in major trade routes (App. B at 79a; App. C at 207a). The longshoremen's demand to load ("stuff") and unload ("strip") all containers was rejected (App. B at 79a; App. C at 207a). A strike then ensued for 57 days on the North Atlantic

[2] Petitioners New York Shipping Association, Inc. (NYSA) and Council of North Atlantic Shipping Associations (CONASA) and Respondent West Gulf Maritime Association (WGMA) are collective bargaining representatives for these longshore employers. NYSA represents shipping employers in the Port of New York, including the individual carrier petitioners (App. C at 204a-205a). CONASA represents constituent multi-employer associations in ports from Rhode Island to Virginia (App. C at 205a). WGMA is NYSA's counterpart in West Gulf ports in Texas and Louisiana.

coast and for more than 100 days in other Atlantic and Gulf ports (App. A at 8a). With the assistance of a federal mediator appointed by the President of the United States the carrier employers finally agreed with the longshoremen's union, the International Longshoremen's Association, AFL-CIO ("ILA"), upon the adoption of the Rules on Containers—essentially the same contractual provisions challenged in this case (App. A at 8a; App. B at 79a).

The Rules are a compromise (App. C at 262a). Longshoremen had a virtual veto over the introduction of containerization. This Court has recognized that it would have been lawful for the dockworkers to "insist on doing the work as it had always been done and try to prevent the employers from using container ships at all." *ILA-I*, 447 U.S. at 510. The longshoremen, however, did not obdurately impede technological progress. They agreed to give up their right to stuff and strip all genuine intermodal containers but refused to relinquish their right to those containers which are loaded or unloaded for hire within the local 50-mile port area (App. B at 79a).[3] The work they retain constitutes only about 20% of all container traffic (App. A at 9a; App. B at 79a). The shipping employers agreed to prevent the diversion of these still necessary work functions to nearby off-pier facilities.[4] This basic compromise enabled containerization to flourish, brought the benefits of intermodalism to the shipping public, and produced a monumental increase in longshore work productivity (App. C at 225a).

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[3] Off-pier stuffing and stripping for hire within the local port area does not involve origin-to-destination, intermodal transport. For most of its journey that cargo which is stuffed or stripped within the port area still moves breakbulk—handled repeatedly by employees of shippers, truckers, railroads and consolidators. The ocean container plays no part in the inland phase of the transport. The loading/unloading of the cargo a short distance from the piers, where virtually all off-pier consolidation facilities are clustered (App. C at 211a), does not provide any of the intermodal benefits of containerization. It serves only to allow cheap labor to purloin the longshoremen's rightful work.

[4] To induce on-pier performance of this work in the first instance, the shipping employers agreed that they would not make their containers available off-pier, so that cargo subject to the Rules would be delivered to the piers in uncontainerized form (App. C at 207a).

Adoption of the Rules on Containers did not put an end to strife but only changed the battlefield. Attacks upon the Rules under federal labor law raged in the courts and before the NLRB from 1973 until 1985. This Court's intervention in *ILA-I* in 1980 put an end to the pattern of triennial strikes that had marked the prior two decades.

History of Litigation

The litigation before the FMC began in 1973, when the Commission commenced an investigation of the Rules because they had been incorporated by a vessel carrier in its ocean tariff. *Sea-Land Service, Inc.—Proposed Rules on Containers* ("*Proposed Rules*"), Nos. 73-17 and 74-40 (FMC Apr. 13, 1973). Five years later the Commission held that the Rules were not entitled to the nonstatutory labor exemption and on their face violated the shipping laws. *Proposed Rules*, 21 F.M.C. 1 (1978). The District of Columbia Circuit sustained denial of the exemption but refused to accept the finding of a violation. It remanded for reconsideration, instructing the FMC to take into account labor factors and the role of collective bargaining in reaching a decision on the substantive shipping law issues. *Council of North Atlantic Shipping Associations* v. *FMC* (*CONASA*), 672 F.2d 171, 181 n.80, 188 n.135, 189 (D.C. Cir.), *cert. denied*, 459 U.S. 830 (1982).

On remand, the Commission summarily reaffirmed its original determination, claiming that labor factors had already been considered. *Proposed Rules*, 21 Shpg. Reg. Rep. (P&F) 852 (FMC 1982).[5] The *CONASA* court disagreed. It vacated the FMC's decision on remand and directed the FMC to stay its re-

[5] Commissioner Daschbach, who had been the Chairman of the Commission in 1978 when its original decision in *Proposed Rules* had been issued, dissented. He candidly admitted that the 1978 decision never took any labor factors into account. He noted that the decision on remand merely reaffirmed the Commission's earlier determination "without fresh analysis" thus "ignor[ing] a clear directive from the Court." When Commissioner Daschbach himself conducted the labor analysis prescribed by the *CONASA* court, he confessed that the earlier determination was wrong and concluded that he "would not now find...[the Rules on Containers] to be unlawful." *Proposed Rules*, 21 Shpg. Reg. Rep. (P&F) at 858-59.

consideration of *Proposed Rules* until it completed Docket No. 81-11, the case now before this Court. *CONASA*, Supplemental Opinion Following Remand, 21 Shpg. Reg. Rep. (P&F) 1057 (D.C. Cir. 1982), *reh'g en banc denied*, No. 78-1776 (D.C. Cir. Sept. 23, 1982).

While review in *Proposed Rules* was pending, the Rules were re-implemented in January 1981 in the wake of this Court's *ILA-I* decision. The Commission then initiated 81-11 to determine whether the Rules violate the shipping acts—the identical question presented in *Proposed Rules*. The Commission's assignment to its Chief Administrative Law Judge, John E. Cograve, expressly precluded any "further evidence regarding labor conditions."

When the *CONASA* court refused to affirm *Proposed Rules*, the FMC switched gears. On the same day it issued its decision on remand in *Proposed Rules*, it amended its interim order in 81-11 to permit the introduction and consideration of labor factors, acknowledging that the District of Columbia Circuit's decision in *CONASA* "made clear that labor policy factors must be considered in Shipping Act deliberations" (App. C at 229a).[6]

Docket 81-11 required more than nine months of discovery, consumed two full weeks of hearings, and produced more than 1,300 pages of transcript testimony and 248 exhibits—a record devoted almost entirely to evidence of labor considerations and the effect of the Rules (App. B at 150a). Complying with the directives of both the Commission and the *CONASA* court to take labor considerations into account, Judge Cograve concluded that the Rules are justified by labor considerations and do not violate the shipping statutes (App. B at 151a-152a; App. C at 262a-263a).

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[6] In an unrelated case the Commission affirmed an ALJ decision which noted that what *CONASA* "seems to say insofar as relevant here, is that the Commission is supposed to consider and weigh labor factors when deciding whether certain practices affecting certain shippers of containerized cargo are undue or unreasonable in violation of Sections 16 or 17 of the 1916 Act . . . ." *Port Authority v. New York Shipping Ass'n*, 23 Shpg. Reg. Rep. (P&F) 21, 46 (FMC 1985), *aff'g* 22 Shpg. Reg. Rep. (P&F) 1329, 1340 (Init. Dec. 1984).

Petitioners urged the Commission to affirm because, when labor factors are considered, the Rules meet the "just and reasonable" standards of the shipping statutes. Petitioners showed that the Rules were the *quid pro quo* for the longshoremen's relinquishment of their right to preclude containerization in its entirety and thus made possible full intermodalism for 80% of maritime cargo (App. C at 262a). Petitioners also demonstrated that the Rules do not interfere with the benefits of containerization but only retain for longshoremen work that is being diverted to nearby off-pier facilities. Finally, petitioners underscored Judge Cograve's finding that implementation of the Rules does not present any substantial threat to the continued viability of off-pier businesses.

The Decision of the FMC

The FMC refused to consider a reasonableness analysis based on labor considerations. Despite the prior mandates in *CONASA*, the collective bargaining origins of the Rules, and this Court's vindication of their lawfulness under the labor laws, the FMC limited its analysis to so-called traditional transportation factors and specifically excluded labor considerations (App. B at 74a-75a, 161a, 163a, 171a-172a, 175a). The Commission never explained why labor, without which no transportation enterprise can operate, is not a transportation factor. The FMC determined that on their face the Rules on Containers violate the substantive proscriptions of the shipping statutes (App. B at 74a). Having excluded all evidence of justification, the Commission concluded that the Rules had not been justified.

The linchpin of the FMC's decision is its claim that as a matter of law the Commission is not required or permitted to weigh labor considerations in determining whether the Rules violate federal shipping law (App. B at 74a-75a, 161a, 163a, 171a-172a, 175a). The Commission interpreted the Maritime Labor Agreements Act of 1980 as precluding the agency from considering labor policies in its substantive deliberations but had allowed these same factors to be used to temper the remedy to be fashioned by the Commission (App. B at 75a, 172a). Hence, the Commission stayed its cease and desist order for 90 days to allow management

and labor to achieve what has eluded judges, mediators, agencies, labor, management, and even the antagonists of the Rules for over a quarter of a century—a viable alternative agreement to protect the lawful work preservation rights of dockworkers from Maine to Texas (App. B at 75a, 192a).[7]

The Decision of the Court of Appeals

The court of appeals affirmed the FMC's determination. Despite the universal understanding to the contrary, the appeals court held that the *CONASA* decision did not mandate consideration of labor factors in substantive shipping act determinations (App. A at 34a-35a). The court considered this issue to be one of first impression, noting that, although the Supreme Court had recognized the difficulty and complexity of the issue, it had not yet confronted it (App. A at 3a, 11a, 63a). The circuit court found no guidance either in prior precedent or in the Commission's treatment of the issue (App. A at 36a-40a). Instead, the court developed its own analytical approach, recognizing that it was dealing with the accommodation of overlapping statutory schemes—in this case labor and shipping laws (App. A at 47a-56a).

In the circuit court's view an agency's obligation to harmonize diverse statutory policies comes into play only if its own organic statute conflicts with affirmative obligations or guaranteed rights under another statute or requires the agency to consider congressional policies embodied in other legislation (App. A at 47a-48a). If, however, the agency's own statute prohibits activities which are only privileged but not guaranteed by another statute,

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[7] In the wake of the Commission's decision several off-pier companies commenced complaint proceedings before the FMC seeking reparations for damages allegedly incurred from the implementation of the Rules. *See Direct Container Line* v. *Atlantic Container Line*, No. 88-14 (FMC filed May 6, 1988); *Votainer BV* v. *Atlantic Container Line*, No. 88-18 (FMC filed July 19, 1988). These proceedings were consolidated with an earlier reparations action filed shortly before the Commission's initiation of the Docket 81-11 investigation. *See International Ass'n of NVOCCs* v. *Atlantic Container Line*, No. 81-5 (FMC filed Jan. 22, 1981). The total reparations sought exceed $50 million. The reparations proceedings have been stayed pending completion of judicial review in this case.

then, in the circuit court's opinion, there would be no duty to harmonize (App. A at 47a).

The court of appeals concluded that the labor statutes in this case do not guarantee the right to preserve work but only grant a privilege to engage in collective bargaining over that subject (App. A at 56a-64a). Hence, the court approved the FMC's refusal to take labor factors into account in making its substantive shipping law determinations (App. A at 57a, 64a).

REASONS FOR GRANTING THE WRIT

1. Substantial Questions of National Scope and Importance

This case presents substantial questions as to whether work preservation is a right which the shipping laws must accommodate. This Court has already recognized that these questions, which involve overlapping congressional policies, "present difficult and complex problems." *ILA-I*, 447 U.S. at 512. The court of appeals shared these sentiments (App. A at 3a). It is readily apparent from the breadth of its opinion that the District of Columbia Circuit considered the intertwined federal labor and shipping questions substantial and significant. The court of appeals stayed its mandate pending disposition of the case by this Court.

The court of appeals fashioned a novel and unprecedented test concerning the duty of federal agencies to harmonize their own statutory mandates with the congressional purposes and policies embodied in other statutory regimes. This test has nationwide implications. Not only does it have an immediate practical effect upon the labor relations of the vital longshore industry,[8] but its legal ramifications also extend to every labor contract in the United States. Twice before this Court has recognized the national importance of the work preservation doctrine, when it

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[8] The ILA does not fall within the jurisdiction of the FMC and views the Commission's decision as an abrogation of rights guaranteed to its members by national labor law. The ILA has reopened the national master contract, which had been quickly and peacefully negotiated following this Court's *ILA-II* decision. The labor strife which beset the industry for more than two decades is bound to resume. *See* Solicitor General's Pet. for Cert. in *ILA-I* at 17 (filed Jan. 1980).

granted certiorari in *ILA-I* and *ILA-II*. Those decisions now face evisceration because of a test which permits them to be disregarded. National labor law rights of all workers are at stake.

The import of the decision of the court of appeals is not limited to the domains of labor and shipping. In our highly regulated society there is a need to define the scope of the obligation of administrative agencies to give effect to congressional policies embodied in statutes other than their own. The resolution of this question will affect every sector of the nation regulated by the broad network of federal administrative law. The formulation of criteria to guide agencies in carrying out this reconciliation process is a function of such national scope and importance that it should be done by this Court.

No less deserving of this Court's attention is the subsidiary question of the status of work preservation under national labor law. In the view of the court of appeals work preservation does not qualify as a labor law right (App. A at 57a-59a). It is merely a permissive goal that when achieved still remains at the mercy of other statutory proscriptions (App. A at 58a-59a). It would seem that other tribunals do not share this view; they consider work preservation to be a right under the labor laws. *Sheet Metal Workers Local 223* v. *NLRB*, 498 F.2d 687, 697 (D.C. Cir. 1974); *Canada Dry Corp.* v. *NLRB*, 421 F.2d 907, 910 (6th Cir. 1970). Indeed, the NLRB administrative law judge who upheld the Rules in *ILA-II* understood that the longshoremen "had a legitimate right to restrict the technology developed by the steamship companies to reclaim or preserve that work." *International Longshoremen's Association*, 266 N.L.R.B. 230, 252 (1983).

The status of work preservation under the labor statutes is critical to the disposition of this case. Under the reconciliation test adopted by the circuit court only rights qualify for statutory harmonization (App. A at 56a). If that test is wrong, if reconciliation does not depend upon rights guaranteed but upon congressional policies and purposes, *see infra* pp. 11-13, the labor law status of work preservation would still be important to the reconciliation process itself. The extent to which work preservation

should be accommodated in another statutory scheme will be informed by the degree of importance that work preservation enjoys in its own statutory domain. But the importance of defining the nature of work preservation extends far beyond the confines of this case.

If the court of appeals is correct in its denigration of work preservation, serious questions arise in other labor law contexts. In the area of pre-emption only activities actually protected or arguably prohibited by federal labor law are beyond state regulation. *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180, 198, 207 (1978). To be protected, the activity must qualify as a right under § 7 of the National Labor Relations Act, 29 U.S.C. § 157 (1982). To trigger pre-emption, then, work preservation would have to fall within the § 7 category of "other concerted activities." If that were the case, work preservation would also be a right for purposes of statutory reconciliation under the test formulated by the court of appeals in this case. Hence, the circuit court's classification as a mere privilege, not a right, makes all work preservation agreements vulnerable to state regulation. Before what is perhaps the most important labor relations issue in this age of technological explosion is to be exposed to potentially conflicting jurisprudence based upon its status under the labor law, this Court should decide what that status is.

2. Conflict With Applicable Decisions of this Court

Statutory reconciliation extends not merely to rights and prohibitions expressly prescribed in the statutes at issue but to their underlying congressional policies and objectives. *Community Television of Southern California* v. *Gottfried*, 459 U.S. 498, 509 n.14 (1983) ("policies underlying other federal statutes"); *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 80 (1944) ("overlapping and at times inconsistent policies embodied in other legislation"); *Southern Steamship Co.* v. *NLRB*, 316 U.S. 31, 47 (1942) ("other and equally important Congressional objectives"); *see also Denver and Rio Grande Western R. Co.* v. *United States*, 387 U.S. 485, 492-94 (1967). The principal elements of the test fashioned by the

court of appeals are directly at odds with the reconciliation approach in these cases.

Although the circuit court could not avoid the longstanding doctrine of statutory reconciliation, it managed to fashion three limitations which permit an agency in administering its own organic statute to disregard unmistakeable congressional policies embodied in others (App. A at 47a-48a). The first limitation, which the court of appeals labels a "false conflict," permits an agency to outlaw activity which is only privileged under another federal statute if the agency's own organic statute condemns it (App. A at 47a). The second limitation, styled a "true conflict," excuses reconciliation unless the agency's organic statute conflicts with an affirmative duty or guaranteed right expressly contained in another statute (App. A at 47a-48a). The third limitation, which the court of appeals refers to as the "incorporation" category, requires a court to defer to an agency's interpretation that its own statute does not reflect a congressional direction to engage in the reconciliation process (App. A at 48a).

The first two limitations are actually opposite sides of the same coin. In the view of the court of appeals the right/privilege distinction is the dispositive factor (App. A at 56a). Unless the agency is faced with an obligation imposed or a right guaranteed in another federal statute, statutory reconciliation is not required (App. A at 47a-48a). Decisions of this Court do not so constrain the will of Congress. There is no precedent of this Court which would support a limitation on an agency's duty to harmonize that would confine it to absolute rights and obligations. Legislative policies and objectives are not always carried out directly by statutory rights or prohibitions. Congress may achieve its aims in other ways. This Court has always considered reconciliation to be a process that deals with overall congressional design rather than with isolated statutory language.

The doctrine of reconciliation is not a mechanism for the vindication of private interests. It exists to promote the will of Congress, even when the congressional agenda is not effectuated through the prescription of express rights and duties. Regardless

of the status of work preservation as an express substantive right under federal labor law, this Court has recognized that "among the primary purposes protected by the Act is 'the purpose of preserving for the contracting employees themselves work traditionally done by them.'" *ILA-I*, 447 U.S. at 504 (citation omitted). The test adopted by the court of appeals, if allowed to stand, would frustrate this congressional purpose.

The third limitation created by the circuit court in this case is equally discordant with prior decisions of this Court. This limitation depends upon the notion that reconciliation is not required unless there appears in the agency's enabling statute some indication of a congressional desire that the agency take into account the desiderata of other statutes (App. A at 48a). The court of appeals misconstrues the doctrine of reconciliation.

The duty to harmonize has its origin not in the provisions of any particular legislation but in an overriding jurisprudential principle often articulated by this Court that "'when there are two acts upon the same subject, the rule is to give effect to both if possible.'" *California* v. *FPC*, 369 U.S. 482, 485 (1962), *quoting United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939); *see also Morton* v. *Mancari*, 417 U.S. 535, 551 (1974); *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963).[9] Never has this Court conditioned reconciliation upon the presence of a statutory direction. Indeed, it has not hesitated to require harmonization even in the

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[9] The court of appeals was mistaken in thinking that *Burlington Truck Lines* v. *United States*, 371 U.S. 156 (1962) and *Local 1976, United Brotherhood of Carpenters and Joiners* v. *NLRB* (*Sand Door*), 357 U.S. 93 (1958), afford contrary authority. The *Sand Door* Court recognized that the Interstate Commerce Commission (ICC) might decide to modify its position that common carrier obligations are not excused by a hot cargo clause and adopt an accommodation under which "because of certain compelling considerations, a carrier is relieved of its usual statutory duty." 357 U.S. at 109. A plurality of the *Burlington* Court directed the ICC to accommodate labor factors by "requiring the carriers to provide service in a manner and to the extent compatible with their labor agreements and with both the carriers' and the union's rights and duties under federal labor law." 371 U.S. at 177 (concurring opinion of Goldberg, J.). The court of appeals in this case is out of touch with the true attitude of this Court—that diverse congressional schemes must be harmonized even without a specific direction in either of the overlapping statutes.

absence of any indication in either of the competing statutes that Congress contemplated that exercise. *See, e.g., FTC* v. *A.P.W. Paper Co.*, 328 U.S. 193, 202 (1946); *Southern Steamship Co.* v. *NLRB*, 316 U.S. 31, 47 (1942).

However, when the prohibitions in the agency's organic statute are not absolute, when the statute contains terms like "public interest," "just and reasonable," "lawful object," "just and adequate," as do the federal shipping statutes at issue in this case, then the duty to reconcile becomes all the more compelling. *See, e.g., NAACP* v. *FPC*, 425 U.S. 662 (1976) ("just and reasonable" rates); *Denver and Rio Grande Western R. Co.* v. *United States*, 387 U.S. 485 (1967) ("public interest" and "lawful object"); *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963) ("just and adequate" rules); *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944) ("just and reasonable" and "public interest"). This kind of statutory language is not a rarity. It permeates the entire United States Code. A Westlaw search revealed the existence of literally thousands of statutory provisions containing the type of language that this Court has recognized to be a congressional facilitation of the duty to harmonize.[10]

Although the court of appeals understood the significance of Congress' choice of words, it nonetheless converted them into a catalyst not of reconciliation but of conflict. Under the circuit court's formulation the presence of capacious language in the agency's organic statute actually provides the means for the agency to escape the duty to reconcile. In the view of the court of appeals an agency can, under the guise of interpretation, dispense with even the attempt to reconcile, and a reviewing court is powerless under the standards of *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 842-45 (1984), to correct this omission out of deference to the agency's expertise in construing its own statute (App. A at 40a-42a).

The only qualification the court of appeals would impose is that the agency's interpretation rejecting reconciliation "need

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[10] The term "reasonable" appears in more than 3,500 sections; "just" or "unjust" in more than 400; "fair" or "unfair" in more than 1,400.

only be not inconsistent with" the policies of the agency's own legislation (App. A at 61a). This qualification is self-fulfilling, since an outright refusal to consider the policies embodied in another statute will always appear to promote the agency's own statutory mission. In effect the court of appeals is giving agencies unbridled discretion to disregard important congressional policies.[11]

Petitioners realize that this tribunal does not sit to correct isolated error in individual cases. Here, however, the circuit court's rewriting of the doctrine of statutory reconciliation is directly at odds not only with the prior decisions of this Court but with the overriding congressional design expressed throughout the body of federal administrative law that agencies are not islands unto themselves but parts of a national system entrusted with a duty to carefully accommodate their own statutory mandates with other, equally important congressional policies. *See Community Television of Southern California* v. *Gottfried*, 459 U.S. 498, 516-17 (1983) (dissenting opinion of Brennan, J.). Review by this court is warranted whenever any circuit distorts a fundamental principle of federal law. Where, as here, that principle pervades the entire fabric of the federal system of administrative agencies, review is all the more necessary. When the aberration is promulgated by the very circuit that is the principal overseer of all federal agencies, Supreme Court review is essential.

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[11] The mischief to which uncritical deference can lead is illustrated by this very case. The Commission's refusal to harmonize was based not upon an interpretation of any substantive shipping law provision but upon its reading of the Maritime Labor Agreements Act (App. A at 37a; App. B at 129a, 134a-135a). The court of appeals held that it owed no deference to the Commission's construction of this purely jurisdictional statute and found the Commission's interpretation to be incorrect (App. A at 39a-40a). Once the circuit court had rejected the only basis on which the FMC refused to reconcile, there was nothing to which the circuit court owed deference. It need not be belabored that the 90-day stay that the FMC attached to its remedy is hardly a genuine attempt at harmonization of the shipping and labor laws. Moreover, fashioning of a remedy in no way entails expert interpretation of any provision of the shipping statutes.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
November 3, 1988

Respectfully submitted,

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88-756

APPENDIX

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

No. 88-

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NEW YORK SHIPPING ASSOCIATON, INC.; COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS; ATLANTIC CONTAINER LINE, LTD.; OOCL-UK, LTD.; HAPAG-LLOYD AKTIENGESELLSCHAFT; "ITALIA" S.P.A.N.; NEDLLOYD LINES, B.V.; PUERTO RICO MARITIME SHIPPING AUTHORITY; TRANS FREIGHT LINES, INC.; P&Q CONTAINERS (TFL) LIMITED; and SEA-LAND SERVICE, INC.,

Petitioners,

v.

FEDERAL MARITIME COMMISSION; UNITED STATES OF AMERICA; AMERICAN TRUCKING ASSOCIATIONS, INC.; AMERICAN WAREHOUSEMEN'S ASSOCIATION; NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC.; FLORIDA CUSTOM BROKERS AND FORWARDERS ASSOCIATION; INTERNATIONAL ASSOCIATION OF NVOCCS; and WEST GULF MARITIME ASSOCIATION,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX A
Opinion of Court of Appeals

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court Of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 17, 1987 Decided August 9, 1988

No. 82-1347

NEW YORK SHIPPING ASSOCIATION, INC.,
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,
ATLANTIC CONTAINER LINE, LTD.,
DART CONTAINERLINE COMPANY, LIMITED,
HAPAG-LLOYD AKTIENGESELLSCHAFT,
"ITALIA" S.P.A.N.,
NEDLLOYD LINES B.V.,
PUERTO RICO MARITIME SHIPPING AUTHORITY,
SEA-LAND SERVICE, INC.,
TRANS FREIGHT LINES, INC., and
UNITED STATES LINES, INC., PETITIONERS

v.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

No. 87-1370

NEW YORK SHIPPING ASSOCIATION, INC., et al.,
PETITIONERS

v.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

AMERICAN TRUCKING ASSOC., INC.,
AMERICAN WAREHOUSEMEN'S ASSOC.,
WEST GULF MARITIME ASSOC.,
NATIONAL CUSTOMS BROKERS & FORWARDERS
ASSOCIATION OF AMERICA, INC.,
INTERNATIONAL ASSOCIATION OF NVOCCs, et al.,
INTERVENORS

Petition for Review of an Order of the
Federal Maritime Commission

Donato Caruso, with whom *C.P. Lambos*, for New York Shipping Association, Inc.; *William Karas*, for Atlantic Container Line, Ltd.; *Thomas W. Gleason* and *Ernest L. Mathews, Jr.* for International Longshoremen's Association, AFL-CIO; *Robert S. Zuckerman*, for Sea-Land Service, Inc.; *Francis A. Scanlan*, for Council of North Atlantic Shipping Associations, were on the joint brief for petitioners. *Nicholas G. Maglaras* also entered an appearance for New York Shipping Association, Inc. in 87-1370. *Edwin Longcope* and *Allan J. Berdon* also entered appearances for petitioner, Dart Containerline Company, in 82-1347.

James W. Pewett and *Ronald A. Capone* entered appearances for petitioner Puerto Rico Maritime Shipping Authority in 82-1347.

Stanley O. Sher, John R. Attanasio and *Robert A. Hazel* entered appearances for petitioners, Hapag-Lloyd Aktiengesellschaft, "Italia" S.P.A.N. and Nedlloyd Lines in 82-1347.

John C. Cunningham, Attorney, Federal Maritime Commission, with whom *Robert D. Bourgoin*, General Counsel, Federal Maritime Commission, *Robert B. Nicholson, Robert J. Wiggers*, Attorneys, Department of Justice and *Gordon M. Shaw*, Attorney, Federal Maritime Commission were on the brief, for respondents. *C. Jonathan Benner*, Attorney, Federal Maritime Commission, also entered an appearance for respondent, Federal Maritime Commission, in 82-1347.

Gerald Ullman for National Customs Brokers and Forwarders Association of America, Inc., with whom, *Kenneth E. Siegel*,

Kevin M. Williams, for American Trucking Associations, Inc.; *William H. Towle*, for American Warehousemen's Association; *Raymond P. deMember*, for International Association of NVOCC's and Florida customs Brokers and Forwarders Association, were on the joint brief for intervenors, American Trucking Association, Inc., et al. in 87-1370. *Daniel R. Barney* also entered an appearance for intervenor, American Trucking Association, Inc., in 87-1370.

R. Frederic Fisher, Lawrence N. Minch and Richard D. Gluck were on the brief for intervenor, West Gulf Maritime Association, in 87-1370.

Before: BUCKLEY and D.H. GINSBURG, *Circuit Judges* and MARKEY, * *Chief Judge*.

Opinion for the court filed by *Circuit Judge* D.H. GINSBURG.

D.H. GINSBURG, *Circuit Judge*: These two petitions for review require us to revisit the legal imbroglios arising from a collective bargaining agreement between the International Longshoremen's Association (ILA) and ocean common carriers, known as the Rules on Containers. The Rules implement, in ports along the Eastern Seaboard and the Gulf of Mexico, a technological innovation in the ocean shipping industry referred to as "containerization." The Supreme Court has held that the Rules are a valid work preservation agreement under the federal labor laws, in a case where the "difficult and complex problems" that the Rules pose under the federal shipping laws were "not properly before [the Court]." *NLRB v. International Longshoremen's Ass'n (ILA I)*, 447 U.S. 490, 512 (1980). These shipping law problems are now ripe for our consideration.

The only issue in No. 82-1347 is whether the Commission properly assumed jurisdiction over the provisions of the Rules

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* Of the United States Court of Appeals for the Federal Circuit, sitting by designation pursuant to 28 U.S.C. § 291 (a).

filed in carrier tariffs.[1] In No. 87-1370, we review the Commission's decision on the merits that certain shipping practices mandated by the collectively bargained for Rules violate, as published in tariffs, the shipping laws.[2]

The Commission held that its regulatory jurisdiction extends to those provisions of the Rules that must be published in the tariffs of the signatory carriers. In exercising that jurisdiction, the Commission concluded that "any effort . . . to balance 'labor considerations' against the clear evidence of unreasonable transportation burdens and discriminations before [it] would represent a failure . . . to discharge the duties assigned to [it] by Congress . . . ." *"50 Mile Container Rules" Implementation by Ocean Common Carriers Serving U.S. Atlantic and Gulf Coast Ports*, 24 Shpg. Reg. Rep. (P&F) 411, 415 (1987) (hereinafter *50-Mile Rules*). Analyzing the Rules under "traditional transportation factors," the Commission held that the shipping practices mandated by the Rules were unreasonable and unjustly discriminated against certain classes of shippers. Accordingly, the respondent carriers were ordered to cease and desist from publishing the Rules in their tariffs and from enforcing them. In Part I of this opinion, we discuss the background to this dispute, containerization and its effect on the shipping industry, the Rules and prior litigation surrounding them, and the proceedings before the Commission in this case. In Part II, we determine that this court has jurisdiction over the petition for review in No. 82-1347, and that the Commission properly assumed jurisdiction over the Rules as carrier tariffs. In Part III, we uphold the Com-

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[1] The petitioners in this proceeding are New York Shipping Association, Inc., the International Longshoremen's Association, the Council of North Atlantic Shipping Associations, Atlantic Container Line Ltd., Dart Containerline Co., Hapag-Lloyd Aktiengesellschaft, "Italia" S.P.A.N., Nedlloyd Lines B.V., Puerto Rico Maritime Shipping Authority, Sea-Land Service, Inc., Transfreight Lines, Inc, and United States Lines.

[2] The petitioners in No. 87-1370 are those in No. 82-1347 and the P & OCL (Trans Freight Lines), Ltd. Intervening in their support is the West Gulf Maritime Association. Intervening in support of the Commission and the United States are the American Trucking Associations, Inc., the American Warehousemen's Association, the National Customs Brokers and Forwarders Association of America, Inc., the International Association of NVOCCs, and the Florida Custom Brokers and Forwarders Association.

mission's conclusion that the Rules were unreasonable and discriminatory insofar as transportation criteria alone are considered, and approve its determination to exclude from its analysis the labor policy considerations urged upon it by petitioners.

Having found that the Commission's decisions concerning both the scope of its jurisdiction and the substantive validity of the Rules are consistent with its statutory mandate, and that substantial evidence supports its ruling on the merits, we deny the petitions for review.

I. BACKGROUND

The introduction of container technology revolutionized the maritime shipping industry, altering in fundamental ways the methods by which large quantities of oceanbound cargo are handled and transported. It has been hailed as "the single most important innovation in ocean transport since the steamship displaced the schooner." *ILA I*, 447 U.S. at 494 (quoting Ross, *Waterfront Response to Technological Change: A Tale of Two Unions*, 21 LAB. L. J. 397, 398 (1970)).

A. *Containerization and the Rules*

Containerization is important to the shipping industry primarily because it is an efficient intermodal means of transporting ocean-bound cargo to and from inland origins or destinations. Both shippers (those seeking to have cargo transported) and carriers (those actually transporting the cargo) benefit from the efficiencies of containerization. Before containerization was implemented, all cargo to be shipped by ocean common carriers was transported to the pier from inland origination points by truck or railcar. The loose, or "break-bulk," cargo was there unloaded by employees of the ocean carriers or of stevedoring companies, known as longshoremen. These workers then transferred the cargo piece by piece to the ship. This process is self-evidently labor-intensive, requiring longshoremen to check and sort the cargo, place it on pallets, hoist it by means of a forklift or hook onto the deck of the ship, and stow it into the ship's hold. For incoming cargo, the process was essentially reversed.

Containers eliminate much of the on-pier handling of cargo. They are large metal receptacles that can be loaded (or in the parlance of the trade, "stuffed") at off-pier facilities, attached to a truck chassis or a rail flatcar at those facilities, transported to a pier, and finally, loaded directly into specially designed "container ships." The containers can likewise be removed from the ship and transported directly to the ultimate consignee for unloading (or "stripping"). Containers thus link landbound methods of transportation to ocean-bound methods, with obvious advantages:

> The use of containers is substantially more economical than traditional methods of handling cargo. Because cargo does not have to handled and repacked as it moves from the warehouse by truck to the dock, into the vessel, then from the vessel to the dock and by truck or rail to its destination, the costs of handling are significantly reduced. Expenses of separate export packaging, storage, losses from pilferage and breakage, and costs of insurance and processing cargo documents may also be decreased. Perhaps most significantly, a container ship can be loaded or unloaded in a fraction of the time required for a conventional ship. As a result, the unprofitable in-port time of each ship is reduced, and a smaller number of ships are needed to carry a given volume of cargo.

ILA I, 447 U.S. at 494-95 (footnotes omitted). *See generally* Note, *Containerization and Intermodal Service in Ocean Shipping*, 21 STAN. L. REV. 1077, 1078 (1969).

The efficiencies of containerization as a means of transporting cargo between shippers and carriers have also been exploited by various cargo-handling businesses. "Non-vessel operating common carriers" (NVOs), also referred to as consolidators, offer container services to shippers with less than containerload quantities of cargo to transport. These shippers would otherwise have to transport their cargo by traditional, labor-intensive methods. The cost of shipping such smaller loads are much higher than the costs of transporting cargo in containers, not only because pier-side labor costs generally exceed off-pier labor costs,

but also because break-bulk cargo is subject to higher carrier rates than containerized cargo.

An NVO offers the advantages of containerization to a shipper with less than containerload quantities of cargo by consolidating its cargo with that of other shippers, stuffing it into one container, and transporting it under a single bill of lading at container rates. When the container is delivered by the ocean carrier to its port destination, it is forwarded to the NVO's facilities where the cargo in it is sorted and transported to its various consigness. NVOs perform these consolidation and deconsolidation functions at their own facilities, or by contract with independent warehousemen or trucking companies, or less frequently, by delivering consolidated shipments break-bulk to the pier where they are stuffed into containers by longshoremen in the first instance. NVOs take their profits by charging rates within the margin between carrier rates applicable to break-bulk shipments (which the smaller shippers would otherwise have to pay) and special "freight-all-kinds" rates governing consolidated containerloads. Shippers obtain additional advantages from NVOs, including "shorter delivery times, a single age at dockside, and specialized services not provided by the [ocean carriers]." *Council of North Atlantic Shipping Ass'ns v. FMC (CONASA)*, 672 F.2d 171, 174 (D.C. Cir. 1982) (footnotes omitted).

Despite the beneficial effects of containerization in terms of pierside productivity and transportation efficiency, containerization has not been an unalloyed blessing to the shipping industry. As is typically the case when innovative labor-saving devices become available to industry, container technology has had a considerable impact on workers. The longshore trade has been noticeably and severely affected. "In the Port of New York alone, ... annual [longshore] employment slipped from 43,000,000 manhours in 1958 to less than 20,000,000 in 1977 while the annual volume of cargo shipped through the port doubled." *American Trucking Ass'ns v. NLRB*, 734 F. 2d 966, 969 (4th Cir. 1984), *aff'd sub nom., NLRB* v. *International Longshoremen's Ass'n (ILA II)*, 473 U.S. 61 (1985); *see* CONASA, 672 F.2d at 174-75. As a consequence, containerization has created deep divisions between the

ILA and ocean common carriers; it has been a "hotly disputed topic of collective bargaining." *ILA I*, 447 U.S. at 496.

The Rules on Containers, the relevant portions of which are set out in Appendix A to this opinion, are the result of that collective bargaining, pitting carriers, seeking fully to implement container technology, against the ILA, bargaining to preserve jobs for its members. An agreement between these competing interests was reached only after intervention by a presidentially-appointed mediator and a bitter strike in 1968 that lasted 57 days in the Port of New York and more than 100 days in the Gulf ports. *See CONASA*, 672 F.2d at 175-76.

The Rules create zones with a 50-mile radius from designated points at each ILA part along the Atlantic and Gulf coasts. The Rules require that all containerload cargo originating from or destined to locations within the zones be stuffed or stripped at the pier by ILA longshoremen. Exceptions are made for containers stuffed with mail, personal belongings of individuals taking up residence overseas, and the personal effects of military personnel.

The Rules also exempt export and import cargo in full containers that have been stuffed by "qualified shippers and consignees" and meet certain other requirements. A qualified shipper is defined in the Rules as a "manufacturer or seller having a proprietary interest (other than in the transportation or physical consolidation or deconsolidation) in the export cargo being transported and who is named in the dock/cargo receipt." A qualified consignee, likewise, is defined as a "purchaser or one who has a proprietary financial interest (other than in the transportation or the physical consolidation or deconsolidation) in the import cargo being transported and who is named in the delivery order." The other requirements are that the container must be stuffed or stripped, respectively, at the qualified shipper's or the qualified consignee's own facilities by its own employees. An additional exemption is provided for full containerload import cargo of a qualified consignee stripped at a "bona fide public warehouse" within the 50-mile zones.

The Rules prohibit ocean carriers from furnishing containers to NVOs or other consolidators or deconsolidators. As a re-

sult, these NVOs must lease or purchase containers from other suppliers if they choose to deliver containerized cargo to the pier.[3] By contrast, carriers furnish containers at no charge to "qualified" shippers and consignees, as well as to shippers and manufacturers outside the 50-mile zones.

The Rules are enforced through an elaborate system of reporting requirements and penalties. Shippers must submit documentation enabling the carriers to determine whether the shippers' containers are exempt from pier-side stuffing and stripping. If a shipper delivers a stuffed, non-exempt container to the pier, it must be stripped and restuffed into the same container by ILA workers, at a cost that varies from $200 to $325 per container, depending upon its size.[4] The Rules do not require that these costs be passed on to the nonconforming shipper, but generally it is the shipper who pays. Should a nonexempt container surreptitiously pass over the pier, the ocean carrier transporting it is subject to a penalty of $1000.

The generally accepted net result of the Rules is that "about 20 percent of the containerized cargo [is preserved] to the longshoremen for stuffing and stripping, with the remaining 80 percent passing over the piers intact." *50-Miles Rules*, 24 Shpg. Reg. Rep. at 417; *see CONASA*, 672 F.2d at 176.

B. *Prior Litigation Over the Rules*

1. Labor Law Issues

Between 1973 and 1979, the NLRB entertained a series of challenges to the Rules under sections 8(e) and 8(b)(4)(B) of the National Labor Relations Act, 29 U.S.C. §§ 158(e) & 158(b)(4)(B) (1982). Those provisions generally proscribe union activity, unilateral or in concert with an employer, that is intended to have "secondary" effects—*i.e.*, that seeks to affect labor or business

[3] One member of the Board of the International Association of NVOs stated in an affidavit submitted to the Commission that the expense of leasing a 20-foot container on a one-way voyage in the North Atlantic trade typically varies from $200-$300.

[4] Restuffing may also result in less efficient use of container space. One consolidator testified that containers delivered to the piers were stripped by longshoremen and restuffed into twice the number of containers

relationships outside its own collective bargaining relations. Specifically, truckers and consolidators alleged that the Rules were an illegal "hot cargo" agreement—a form of prohibited secondary activity—because the ILA was attempting to obtain for its members work that had traditionally been performed at off-pier facilities. The union and the carriers, by contrast, argued that the Rules were not intended to be a vehicle for securing for longshoremen work that had traditionally been performed by truckers or consolidators; instead, they maintained that the work in question was analogous to work falling within the ILA's traditional jurisdiction. In their view, the Rules were thus a valid "work preservation" agreement.

The NLRB defined the work in dispute as "the off-pier stuffing and stripping of containers." *See, e.g. International Longshoremen's Ass'n (Dolphin Forwarding, Inc.)*, 236 N.L.R.B. 525, 526 (1978). With the work so defined, the NLRB agreed with the complaining parties that the Rules were an unlawful attempt by the ILA to acquire extra-jurisdictional work. It consequently ordered the ILA and certain signatory carriers to cease and desist from enforcing the Rules. This court, however, in *International Longshoremen's Ass'n v. NLRB*, 613 F.2d 890 (D.C. Cir. 1979), declined to enforce an NLRB cease and desist order against the Rules.

The Supreme Court affirmed our decision, holding that the NLRB had misapplied the "work preservation doctrine." *ILA I*, 447 U.S. at 507-11. According to the Court, the NLRB "ignore[d] the fact that the impact of containerization occurred at the interface between ocean and motor transport . . . ." The work in question, therefore, could reasonably be regarded as work traditionally performed either by longshoremen or by off-pier trucking and cargo-handling businesses. The Court remanded the case for the NLRB to consider in the first instance "whether the historical and functional relationship between this retained work and traditional longshore work can support the conclusion that the objective of the [Rules] was work preservation rather than the satisfaction of union goals elsewhere." *Id.* at 508. After the NLRB had reconsidered the matter, the Supreme Court revis-

ited the issue, holding that the Rules in their entirety are a permissible work preservation agreement. *ILA II*, 473 U.S. at 84.

Despite these two journeys from the NLRB to the Supreme Court, the question whether the Rules may lawfully be implemented and enforced by ocean common carriers remains an open one. For, in *ILA II*, the Court did not confront the issue it had specifically reserved in *ILA I*: whether the Rules on Containers run afoul of the proscriptions against unreasonable and discriminatory practices with which ocean carriers must comply under the federal shipping laws. Thus, after surviving barrages from multiple legal arsenals, it is clear only that the proponents of the Rules have won an important battle; they have not emerged victorious in this twenty-years' war.

2. Shipping Law Issues

Well before the Supreme Court decided the labor law issues in *ILA I* and *ILA II*, the Rules were embattled under the shipping laws before the Federal Maritime Commission. On March 15, 1973, two common carriers, Sea-Land Services, Inc. and Gulf Puerto Rico Lines, Inc., filed with the Commission proposed amended tariffs, which included provisions of the Rules on Containers then in effect. The Commission, acting pursuant to its authority under the Intercoastal Shipping Act, 1933, 46 U.S.C. § 843 *et seq.* (1982), suspended the tariffs and instituted an investigation to determine whether the Rules, if implemented by the carriers, violated specified sections of the Shipping Act, 1916, 46 U.S.C. § 813 *et seq.*, and the Intercoastal Act.

Hearings were conducted before an Administrative Law Judge (ALJ), who concluded that the Commission properly exercised jurisdiction over the Rules and that the Rules violated all the cited provisions of the shipping laws. *Sea-Land Serv., Inc. and Gulf Puerto Rico Lines, Inc.—Proposed Rules on Containers*, Initial Decision, 21 F.M.C. 7 (1978). The ALJ noted the "fundamental truth . . . that the FMC has jurisdiction over tariffs (rules, rates, etc.) of ocean common carriers," from which it followed "the FMC clearly has jurisdiction over the lawfulness of [the] tariff rules" under investigation. He went on to observe that "unlawful tariff rule discrimination is unlawful tariff rule

discrimination, regardless of the fact that it may have been caused by a work preservation rule, and it matters not at all whether the work preservation rule is lawful in and of itself." *Id.* at 29.

The Commission adopted the ALJ's decision, changing only the effective date of the cease and desist order. In discussing the parties' exceptions to that decision, however, the Commission addressed the issue of labor policy considerations in somewhat different terms that had the ALJ. It concluded that

> the existence of a collective bargaining agreement which *affects* but is not *a part of* the transportation aspects of a shipper's relationship with his carrier, need not be given overwhelming priority or weight as a transportation factor by which to justify dissimilarity of treatment [among shippers]. We may agree that such an agreement is a factor to be considered. However, there are other factors. The mere existence of a collective bargaining agreement does not pre-empt those other factors of foreclose our consideration of them .... We do not view the impact of the National Labor Relations Act as permitting a common carrier to disregard entirely its statutory obligations when conducting and resolving labor/management negotiations.

Sea-Land Serv., Inc. and Gulf Puerto Rico Lines, Inc.—Proposed Rules on Containers (*Sea-Land*), 21 F.M.C. 1, 4 (1978) (emphasis in original).

The Commission's decision came before this court for review, but the only issue briefed by the petitioners was whether the Commission had jurisdiction to investigate the carriers' tariffs. *CONASA*, 672 F.2d at 179. The carriers seeking review there argued that practices arising out of the terms of a collective bargaining agreement, even if they must be set forth in the carriers' tariffs, are exempt from Commission scrutiny for either or both of two reasons: (1) the limitations on the Commission's jurisdiction set forth in section 5 of the Maritime Labor Agreements Act of 1980 (the MLAA), 46 U.S.C. § 841c; and (2) a nonstatutory labor exemption.

We rejected these arguments, holding first that section 6 of the MLAA, which states that that law "shall not affect ... formal

Commission proceedings prior to the date of [its] enactment," Pub. L. No. 96-325, 94 Stat. 1021 (1980), rendered the jurisdictional limitations that section 5 placed on the Commission inapplicable to the case. *CONASA*, 672 F.2d at 182-83. We also found it was unnecessary to determine

> whether [a] nonstatutory [labor] exemption applies to the substantive provisions of the shipping laws, because the Rules on Containers would not qualify for such an exemption under the definition adopted by the Supreme Court. In 1978 the Court decided, in *FMC* v. *Pacific Maritime Ass'n* [(*PMA*), 435 U.S. 40 (1978)], that an agreement is not exempt if it directly imposes terms on persons or entities outside the agreement. . . . We conclude that, because enforcement of the Rules on Containers by inclusion in steamship company tariffs imposes terms on third parties, it raises shipping law issues which are within the FMC's statutory responsibilities.

Id. at 183.

Although we thus concluded that the Commission properly exercised jurisdiction over the Rules in that case, we remanded the matter on the merits. Two important Supreme Court cases bearing on the issues before the Commission had been decided between the Commission's final order and our decision on review. See *PMA, supra; ILA I, supra.* We thought that, "[i]n the interests of justice, the FMC should have the opportunity to reconsider its previous determination in light of these two decisions." *CONASA*, 672 F.2d at 189. On remand, the Commission reaffirmed its initial opinion. By order of this court, however, further proceedings in that case were held in abeyance pending the Commission's decision in the investigation presently before us.

C. *This Case Before the Commission*

After the Supreme Court decided *ILA I*, the union insisted that all signatory carriers unaffected by the Commission's *Sea-Land* decision adhere to the practices mandated by the Rules. Many carriers complied, and the Rules were implemented until the Third Circuit enforced an NLRB order requiring carriers to cease and desist from doing so pending its decision on remand in

ILA I. Pascarell v. *New York Shipping Ass'n*, No. 81-13 (D. N.J.), *aff'd*, 650 F.2d 19 (3d Cir. 1981). The Rules were thus implemented only briefly during January and February 1981.

This brief implementation of the Rules, however, prompted several complaints from shippers and freight handlers. In response to these complaints, the Commission opened Docket No. 81-11, an investigation naming over 140 carriers as respondents. New York Shipping Association, the Council of North Atlantic Shipping Associations, the Pacific Maritime Association, and the ILA intervened in support of the carriers and of the Rules.

In an Interim Report and Order, the Commission identified five basic issues that the investigation was designed to resolve:

> (1) must practices determining the availability of carrier-controlled containers be published in FMC tariffs; (2) does the [MLAA] alter the Commission's jurisdiction over tariff rates and practices; (3) is Commission regulation of the Container Rules precluded or limited by the policies of the National Labor Relations Act; (4) does the refusal to furnish containers to non-ILA consolidators located within 50 miles of the carrier's pier, or the other Container Rules practices . . . violate sections 14 Fourth, 16 First, 17 or 18 (a) of the Shipping Act, 1916; and (5) which of the Respondents have implemented or would necessarily implement all or part of the Container Rules.

"50-Mile Container Rules Implementation By Ocean Common Carriers Serving U.S. Atlantic and Gulf Coast Ports—Possible Violations of the Shipping Act, 1916, Interim Report and Order, 21 Shpg. Reg. Rep. (P&F) 544, 548 (1982) (hereinafter *Interim Report*).

The Commission held that because the Rules restrict the shipping public's use of shipping "privileges and facilities," "[t]he basic features of the Container Rules must be published in an ocean carrier's tariff," *id.* at 554; that under the "tariff matter provision" of the MLAA, jurisdiction over the Rules was expressly conferred upon the Commission; and that the Rules were therefore subject to the substantive provisions of the shipping laws. *Id.* at 556. The Commission also determined that the Rules

did not meet the criteria for immunity from Commission scrutiny under the "nonstatutory labor exemption" recognized in past commission decisions:

> The Container Rules have a direct and practical impact upon both labor and shipping interests. Nonetheless, a Commission order prohibiting this particular method of resolving labor/management conflict as an unjust ocean carrier practice would not undermine the basic collective bargaining process created by the National Labor Relations Act, whereas the absence of Shipping Act regulation would eliminate the fundamental premise of the Shipping Act and other common carrier statutes—that similarly situated shippers be treated equally.

Id. at 557 (footnote omitted). The Commission referred the remaining issues to an Administrative Law Judge for further hearings.

Before the ALJ, the dispute among the parties centered on the extent to which, if any, national labor policy considerations must be taken into account in determining whether the Rules, insofar as they must be set forth in the respondent carriers' tariffs, constituted unreasonable or unjustly discriminatory shipping practices. The ALJ, assaying this conflict, concluded that "[w]hat is needed then is to establish a methodology or criteria to be used in reconciling 'labor policy' with the requirements of the shipping statutes." *"50 Mile Container Rules" Implementation By Ocean Common Carriers Serving U.S. Atlantic and Gulf Coast Ports*, Initial Decision, 22 Shpg. Reg. Rep. (P&F) 1660, 1680 (1985) (hereinafter *Initial Decision*). In fashioning such a methodology, the ALJ concluded that:

> The problem reduces itself to one of how far the ILA may go in its work preservation efforts before it impermissibly intrudes upon the rights of [others] to conduct their business free of any discrimination or prejudice resulting from the efforts of the ILA. The answer lies in balancing the harm done to [others] against the benefits derived by the ILA.

Id. at 1683.

The ALJ acknowledged that the disparate treatment of shippers mandated by the Rules could not be justified by transporta-

tion considerations, and that his "'balance of interest' test is not itself without difficulty." *Id.* at 1684, 1687-88. Nonetheless, the ALJ held that neither the parties urging the Commission to declare the Rules unlawful nor the Commission's Hearing Counsel had demonstrated that the Rules had "any measurable impact" upon the complaining shippers and cargo handlers. *Id.* at 1684. Without such a showing, the concluded, the Commission and the complainants had failed to carry their evidentiary burden; the Rules, as a consequence, were upheld.

In an exhaustive opinion, the Commission reversed the *Initial Decision*, rejecting the ALJ's "balancing test" as "an illogical and intellectually untenable exercise." *50-Mile Rules*, 24 Shpg. Reg. Rep. at 458. The Commission concluded:

> [O]ur review of the twenty-year history of efforts by this agency, the [NLRB], the courts and Congress to reconcile the demands of the federal maritime and labor statutes indicates that any effort by the Commission to balance "labor considerations" against the clear evidence of unreasonable transportation burdens and discriminations before us would represent a failure by the Commission to discharge the duties assigned to us by Congress, and would undermine the balance between labor and shipping interests devised by Congress when it enacted the Maritime Labor Agreements Act of 1980, Pub. L. No. 96-325, 94 Stat. 1021. We believe that our responsibility to take "labor considerations" into account is limited to ensuring that the appropriate remedy for violations of the Shipping Acts is drawn no more broadly than necessary, so as to avoid any unwarranted impact on the legitimate collective bargaining interests of the carriers and the union.

Id. at 415.

The Commission also rejected as "inappropriately harsh" the evidentiary burden the ALJ had imposed on the Commission's Hearing Counsel and the complaining shippers. In the Commission's view, unless the complaining parties were seeking reparations, "it is sufficient that the testimony supports and confirms the evidence provided by the text of the Rules themselves." *Id.* at 460. The Commission went on to note that, in any event, the

complainants had adduced substantial evidence of injury. *Id.* at 461.

Applying "traditional transportation factors" the Commission held that the shipping practices mandated by the Rules violated sections 14 Fourth, 16 First, 17 second paragraph, and 18(a) of the 1916 Act; sections 10 (b) (6) (C), 10 (b) (11)-(12), and 10 (d) (1) of the Shipping Act of 1984; and section 4 of the Intercoastal Act. *Id.* at 468. Petitioners now seek review of these rulings.

II. The Commission's Jurisdiction Over The Rules

In March 1982, New York Shipping Association and others filed a petition in this court seeking immediate review of the jurisdictional rulings in the Commission's *Interim Report*, a petition which we dismissed without prejudice. *New York Shipping Ass'n* v. *FMC*, No. 82-1347, Order (D.C. Cir. May 19, 1983). In September 1987, after filing a petition for review of the Commission's final decision on the merits, the petitioner moved to reinstate, and the Commission moved to dismiss, the 1982 petition for review of the *Interim Report*. We granted the motion for reinstatement, and ordered the parties to file supplemental briefs addressing in more detail both the jurisdictional basis for the Commission's actions and the Commission's motion to dismiss.

A. *The Commission's Motion to Dismiss*

Preliminary, petitioners argue that because the Commission did not oppose the motion to reinstate the 1982 petition, it "should not be permitted now . . . to raise objections to that motion under the guise of a separate motion to dismiss." The question raised in the Commission's motion goes, however, to the jurisdiction of this court, and as such can be neither foreclosed by the parties nor ignored by the court. *See Owen Equipment & Erection Co.* v. *Kroger*, 437 U.S. 365, 377 n.21 (1978).

The legal principle upon which the Commission relies in its motion to dismiss is that the *Interim Report* is not a "final order"; that being the case, it is not subject to review in this court under the Administrative Orders Review Act, 28 U.S.C. § 2342(3) (1982).

We approach pragmatically the question whether agency action is "final" for purposes of judicial review. *See FTC* v. *Standard Oil of California*, 449 U.S. 232, 239 (1980); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149 (1967). Two considerations bear heavily in our analysis. We must determine "whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency decision." *Port of Boston Marine Term. Ass'n* v. *Rederi. Transatlantic*, 400 U.S. 62, 71 (1970); *see ICC* v. *Atlantic Coast Line R. Co.*, 383 U.S. 576, 603 (1966); *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 143 (1939).

The Commission argues that review of the *Interim Report* will disrupt Commission proceedings, and that the only consequences of its order were that the petitioner carriers had to undertake the minimal burden of filing the Rules as part of their tariffs and to participate in the agency investigation.

The Commission's argument, however, views the *Interim Report* in the abstract, floating free in time. The essential fact is that when reinstated the petition for review of that order in 1987, the Commission had concluded its investigation and had issued a determination on the merits that is indisputably "final." Therefore, in reality, which is time-bound, "there [is] no possible disruption of the administrative process; there [is] nothing else for the Commission to do." *Port of Boston Marine Term. Ass'n*, 400 U.S. at 71.

Lest we assert our jurisdiction in error, however, we also consider the Commission's argument to be that, upon reinstatement, the petition for review "relates back" to the original filing date, and that the question of finality must be decided under the circumstances then in existence. Again taking a pragmatic—we would not be abashed to say mundane—view of finality, we are constrained to disagree.

The earlier petition for review was terminated without prejudice to its renewal; indeed, the show cause order we issued prior to dismissing the petition expressly contemplated that petitioners would be entitled to have the petition reinstated if, but only if, "the final decision of the Commission [did] not otherwise dispose

of the issue raised by the petition for review." *New York Shipping Ass'n* v. *FMC*, No. 82-1347, Order (D.C. Cir. Feb. 10, 1983). In response, petitioners did not oppose termination of the petition for review, presumably because review of the order would be available at a time whe.. those orders became indisputably final.

In its *Interim Report*, the Commission held that the Rules fall within the "tariff matter provision," and therefore not within the exemption for collective bargaining agreements, of section 5 of the MLAA, 46 U.S.C. § 841c (1982). The Commission's final decision did not "otherwise dispose" of this issue; as a consequence, the conclusion stated by the Commission in its *Interim Report* merged into the final decision on the merits. *See Standard Oil Co. of California*, 449 U.S. at 245. In the present context, therefore, the finality requirement is no bar to this court entertaining the reinstated petition for review.

Anticipating this conclusion, the Commission argues in the alternative that because the *Interim Report* merged into its final decision, the case should be dismissed as an impermissible attempt on the part of the petitioners to split a single cause of action by pursuing review in separate judicial proceedings. Concerns about splitting a single cause of action generally arise when the parties to a lawsuit have obtained a final judgment from a court of competent jurisdiction on some aspect of a claim, but one of those parties, unsatisfied with the judgment, later attempts to litigate an allegedly different claim that arises from facts explored in the prior lawsuit. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 18-19, 24-25 (1982). Of course, simultaneous litigation of allegedly different claims arising out of single controversy poses many of the same risks as do successive lawsuits that either arise out of a common nucleus of operative fact or involve the application of settled legal issues to subtantially identical facts involving the same parties.

All such multiplicative proceedings tax an already overburdened judicial system, as well as unfairly burden victors with the costs of meeting the vanquished yet again in legal combat. Worse, two or more courts may reach inconsistent results, subjecting the litigants to conflicting obligations. But we deal with the problem not bluntly, by a general prohibition against frag-

mented litigation over matters arising out of a single controversy; rather, we rely upon the more discriminating principles of issue and claim preclusion. *See generally* 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4404 (1981). Where appropriate, devices such as transfer or consolidation may also be usefully employed.

In no event, however, is there a jurisdictional bar to fragmented litigation; a defense of preclusion, for example, may be waived. *See, e.g., Poulin* v. *Bowen*, 817 F.2d 865, 869 (D.C. Cir. 1987). The Commission's failure to oppose the petitioners' motion to reinstate their petition for review, though not precisely a waiver, renders its eleventh-hour motion to dismiss on the basis of an asserted prohibition against splitting a single cause of action considerably less compelling, especially insofar as it invokes the burden on the Commission as a litigant.

Moreover, the other drawbacks associated with splitting a single cause of action are simply not present in this case. Both the petition for review of the Commission's *Interim Report* and the petition for review of the Commission's final order on the merits are being heard in the same court, by the same panel of judges, at the same time; there is no risk of inconsistent judgments, and the inefficient use of scarce judicial resources is of no real concern.

We are, furthermore, unable to discern that the Commission will in any way be prejudiced if we allow the petition for review of its jurisdictional conclusions to go forward. We therefore conclude that the Commission's motion to dismiss should be denied.

B. *The Scope of the Commission's Jurisdiction Under the Maritime Labor Agreements Act*

The Commission's jurisdiction over carrier practices and agreements arising out of or related to collective bargaining agreements has been a contentious issue for the past twenty years. *See generally* Godwin & Hilton, *A History of FMC Jurisdiction Over Maritime Labor Agreements*, 53 TRANSP. PRACT. J. 127 (1986). The knotty legal issues and policy considerations associated with this long-running dispute have been exhaustively considered and discussed, primarily in the context of the

Commission's power to review and approve maritime agreements under section 15 of the 1916 Act.

Until section 15 of the 1916 Act was superseded by the 1984 Act, carriers were required to file with the Commission certain agreements into which they entered with "another such carrier or other person," 46 U.S.C. § 814 (1982), and the Commission was empowered to

> disapprove, cancel or modify any agreement . . . that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements.

Most significantly, section 15 further provided that any such agreement was "lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement . . . ."

For many years, the Commission resisted the suggestion that maritime collective bargaining agreements were subject to the pre-implementation filing and approval requirements of section 15. *PMA*, 435 U.S. at 64 (Powell, J., dissenting). Subjecting collective bargaining agreements to such procedures might, as Justice Douglas noted, frustrate the collective bargaining process, exposing the parties to "possibly lengthy freezing or stultification of solutions to troublesome labor problems while an intimate part of the proposed agreement is sent to the FMC for approval." *Volkswagenwerk* v. *FMC*, 390 U.S. 261, 312 (1968) (Douglas, J., dissenting); *see Pacific Maritime Ass'n* v. *FMC*, 543 F.2d 395 (D.C. Cir. 1976) (noting that the pre-implementation filing and approval requirements of section 15, if applied to collective bargaining agreements, "make nearly impossible the maintenance or prompt restoration of industrial peace"), *rev'd*, *PMA*, *supra*.

Collective bargaining agreements were not categorically exempt from the Commission's jurisdiction under section 15, however. The Supreme Court concluded that

> Section 15 on its face reaches any contract between carriers "controlling, regulating, preventing, or destroying competition." If a contract is of that nature, it is within the reach of § 15 and subject to the Commission's jurisdiction, and it is quite untenable to suggest that collective-bargaining contracts *never* control, regulate, prevent, or destroy competition.

PMA, 435 U.S. at 53 (emphasis in original).

In 1980 Congress limited the effect of the Court's decision in *PMA* by enacting the MLAA, Pub. L. No. 96-325, 94 Stat. 1022 (1980) (codified in scattered portions of 46 U.S.C.), section 5 of which provides:

> The provisions of this chapter and of the Intercoastal Shipping Act, 1933, shall not apply to maritime labor agreements and all provisions of such agreements . . . .

And that:

> Notwithstanding the preceding sentence, nothing in this chapter shall be construed as providing an exemption from the provisions of this chapter or of the Intercoastal Shipping Act, 1933, for any rates, charges, regulations, or practices of a common carrier by water in interstate commerce or other person subject to this chapter which are required to be set forth in a tariff, whether or not such rates, charges, regulations or practices arise out of, or are otherwise related to a maritime labor agreement.

46 U.S.C. § 841c.

The Commission, addressing the jurisdictional limitations of section 5 in its *Interim Report*, concluded that "the basic features of the Container Rules must be published in an ocean carrier's tariff." *Interim Report*, 21 Shpg. Reg. Rep. at 554. The agency ruled that a container is a "facility" within the meaning of section 18(b)(1) of the Shipping Act, and explained that a tariff "notifies the shipping public of the 'privileges and facilities' offered by

ocean carriers, the conditions applicable to the use of these privileges and facilities, and all rates and charges assessed." *Id.*; *see* 46 U.S.C. § 817(b)(1) (describing tariff filing requirements). As a consequence, it concluded that practices in the Rules affecting the provision and use of containers must be published in the signatory carriers' tariffs. *Id.*[5] It then concluded that

> although various phrases associated with section 5 are susceptible to more than one interpretation, the language of the entire statute and its legislative history taken as a whole firmly support the conclusion that the MLAA preserves the *status quo* concerning Shipping Act regulation of labor-related activities under the Shipping Act sections other than section 15. A tariff practice "arising out of or otherwise related to a maritime labor agreement" therefore includes practices described by language taken verbatim from a labor agreement and practices mandated by the terms of the agreement. Any other interpretation would render the second sentence of MLAA section 5 meaningless.

Id. at 555. The Commission thus held that notwithstanding the general exemption for maritime labor agreements in the first sentence of section 5, the "tariff" matter provision" that follows in the second sentence renders the Rules subject to the Commission's regulatory jurisdiction.

The petitioners dispute the Commission's interpretation of section 5. They argue that the statutory language is clear, categorically exempting *all* maritime labor agreements from *all* regu-

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[5] In *CONASA*, we noted that "under well established shipping law doctrine, all terms and conditions relating to a carrier's acceptance and carriage of cargo must be set forth in its tariff." 672 F.2d at 182. We noted with approval a previous decision of the Commission holding that the Rules were required to be set forth in a carrier's tariff. *Id.*; *see South Atlantic & Caribbean Lines, Inc.*, 12 F.M.C. 237, 238-42 (1969); *see also United States* v. *Sea-Land Serv., Inc.*, 424 F.Supp. 1008, 1011, 1012 (D. N.J. 1977), *appeal dismissed mem.*, 577 F.2d 730 (3d Cir. 1978).

Before the ALJ, the petitioners disputed whether the Rules must be published in a carrier's tariff, regardless of any effects brought about by the MLAA, but they have not preserved the issue before this court.

lation under the shipping laws. They construct the following pair of syllogisms to support their "plain meaning" argument:

Syllogism I

Major Premise: Maritime labor agreements are exempt from all provisions of the shipping statutes.

Minor Premise: The tariff filing requirements of [section] 18 of the 1916 Act, [of section] 2 of the 1933 Act and [of section] 8 of the 1984 Act are provisions of the shipping statutes.

Conclusion: Maritime labor agreements are exempt from the tariff filing requirements of the shipping statutes.

Syllogism II

Major Premise: Only matters required to be set forth in a tariff lose the statutory labor exemption.

Minor Premise: Maritime labor agreements are not required to be set forth in a tariff (Conclusion of Syllogism I)

Conclusion: Maritime labor agreements do not lose their statutory labor exemption.

The petitioners contend that giving effect to this "plain meaning" of section 5 would not, as the Commission claimed, render the tariff matter provision meaningless. In their view, that sentence would still apply to unilateral carrier practices that implement collective bargaining agreements such as the Rules, because such unilateral practices are not "maritime labor agreements" within the exemption from FMC jurisdiction provided by the first sentence of section 5.[8] It is thus the Commission's interpretation that does violence to the language of section 5, they argue, because before the MLAA was enacted only two types of labor agreements triggered the Commission's jurisdiction: (1) those that affected carriers' relations with other carriers, which were subject to preimplementation filing with the Commission and approval under section 15; and (2) those that affected

[8] Nothing in the definition of "maritime labor agreements," 46 U.S.C. § 801, suggests otherwise.

carriers' relations with shippers, which were subject to the tariff filing requirements of section 18 of the 1916 Act. Under the Commission's interpretation, only those agreements subject to section 15 would gain an exemption for maritime labor agreements to the other provisions of the 1916 Act as well.

In *Volkswagenwerk* v. *FMC, supra*, the Supreme Court held that "[t]he construction put on a statute by the agency charged with administering it, is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a 'reasonable basis in law'". *Volkswagen*, 390 U.S. at 272 (quoting *NLRB* v. *Hearst Publications*, 322 U.S. 111, 131 (1944) and *Unemployment Comm'n* v. *Aragen*, 329 U.S. 143, 153-54 (1946)). More recently in a series of cases, the Court has clarified the nature of the judicial role in deciding claims that an agency has misinterpreted a statute it is charged with administering. That role is fulfilled by engaging in a two-step analysis. First, using traditional tools of statutory construction, we must determine whether Congress has spoken to the disputed issue with clarity. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). If, in step one of that analytic exercise, the court is unable to discern a clear congressional resolution of the disputed issue, then "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843; *see NLRB* v. *United Food and Commercial Workers Union, Local* 23, 108 S. Ct. 413, 421 (1987); *INS* v. *Cardoza-Fonseca*, 107 S. Ct. 1207, 1220-21 & n.29 (1987); *Continental Airlines, Inc.* v. *Department of Transportation*, 843 F.2d 1444, 1449 (D.C. Cir. 1988).

For present purposes, we need not explore the question whether the commission "administers" the MLAA or, if it does, how rigorously we must scrutinize the Commission's interpretation of section 5 in order to determine whether that interpretation is "permissible" under step two of the analysis mandated by *Chevron*. Our independent examination of the text of section 5 and its legislative history leads us to conclude that the meaning and purpose of that section can fairly be discerned. In the terms the Supreme Court used in *Chevron*, we conclude that "Congress

has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. Even if it could fairly be said that Congress has not spoken to this issue with utter clarity, moreover, we would be inclined to accept the Commission's interpretation as "reasonable," no matter how strictly that term is applied.

In *CONASA*, we opined that the second sentence of section 5

> appears to retain existing FMC jurisdiction over the Rules on Containers as applied to shipping customers through steamship tariffs. Explicitly aware of the clash of interests created by the Rules, Congress sought to retain FMC jurisdiction to scrutinize the Rules' adverse effects upon shippers.

CONASA, 672 F.2d at 182.

To be sure, this passage from *CONASA* is merely dicta, because the case was resolved under section 6 of the MLAA, which excluded from the reach of section 5 all "formal Commission proceedings commenced prior to the date of enactment" of the MLAA. *Id.* at 182-83 (quoting MLAA section 6). Having reexamined the text of the statute and its legislative history, we are nonetheless convinced that our original impression was correct.

The text of the tariff matter provision makes clear that it qualifies the scope of the exemption in the first sentence. That is the unambiguous meaning of the phrase "notwithstanding the previous sentence." As if to reinforce the qualifying nature of the provision, Congress then stated that "*nothing in this section* shall be construed as providing an exemption . . . for any rates, charges, regulations or practices of a common carrier . . . which are required to be set forth in a tariff, whether or not such rates, charges, regulations, or practices arise out of, or are otherwise related to a maritime labor agreement." Given the "obvious and rational meaning" conveyed by this language—that the exemption simply does not apply if, prior to the MLAA's enactment, the terms of the agreement in question must have been published in a tariff—we readily reject the unnatural interpretation offered by the petitioners. *American Trucking Ass'ns* v. *ICC*, 602 F 2d 444, 449-50 (D.C. Cir. 1979).

The petitioner's syllogisms ignore the qualifying nature of the second sentence, effectively redacting the phrase "notwithstanding the previous sentence." Indeed, their second syllogism, turns the statute on its head, treating the first sentence of section 5 as an exception to the provision.

We also agree with the Commission that, under the petitioners' construction, the tariff matter provision would add nothing to section 5. As we have noted above, when a carrier unilaterally implements practices mandated by the terms of a collective bargaining agreement, and publishes those practices in its tariff, section 5 does not apply, because unilateral practices are not "maritime labor agreements" as defined in section 2 of the MLAA, 46 U.S.C. § 801. It is this definitional limitation, not the tariff matter provision in the second sentence of section 5, that excluded such practices from the concern of the exemption in the first sentence of section 5. Petitioner's interpretation therefore offends the principle that, in construing statutes, one must wherever possible give effect to each word or sentence that the legislature has chosen in expressing its will. *Central & Southern Motor Freight Tariff Ass'n* v. *United States*, 757 F.2d 301, 319 (D.C. Cir. 1985).

Petitioners' argument that the tariff matter provision is limited to unilateral carrier practices is also anomalous in view of MLAA's legislative history and the basic economic considerations underlying its purpose. The original version of section 5 was introduced in the House of Representatives. As we have previously observed, "The House bill removed FMC jurisdiction to review maritime labor agreements, before or after implementation, or to determine their legality under the substantive provisions of the shipping law." *CONASA*, 672 F.2d at 181 (citing H.R. REP. No. 876, 96th Cong., 2d Sess. 11 (1980)). The Senate Committee on Commerce, Science, and Transportation, however, agreed with shippers, consolidators, and others that the broad exemption in the House bill "stripped the FMC of jurisdiction to assure equal treatment of shippers, cargo, and localities and to prevent abuses made possible by one [sic] concerted activity of carriers and others." S. REP. No. 854, 96th Cong., 2d Sess. 10 (1980). This prompted the Senate to propose an amended bill, in the nature of a substitute, that featured the tariff matter provision, "mak[ing]

it clear that the exemption granted would not affect the authority of the Commission to exercise authority [sic] over matters which are properly the subject of tariffs required to be filed with the agency, whether or not those matters arise out of a maritime labor agreement." *Id.* at 14. The revised bill, as thus authoritatively interpreted, was adopted by the Senate without debate, and was passed by the House without further comment on the provision. It is therefore clear that carriers may not, by implementing the terms of a collective bargaining agreement negotiated by a multiemployer bargaining agent, insulate themselves from the Commission's regulatory supervision.

Petitioners' approach is not only at odds with the Senate's clear statement, however; it makes no sense, in view of the overall purpose of the Shipping Act, for the tariff matter provision of the MLAA to deprive shippers of any protection except against unilateral carrier practices. The discriminatory potential of unilateral practices is tempered by the availability of alternative means of ocean carriage and the competitive pressures that all carriers exert on the practices of any single carrier. The risk that shippers will be subjected to unreasonable or discriminatory practices therefore increases directly with the number of individual carriers that agree to implement a particular practice that was negotiated with the union by a multiemployer bargaining agent. Such concerted activity, by effectively instituting a regime of adhesion contracts, limits competition among carriers as a "regulator" for the protection of consumers (shippers) and increases their dependence upon the Commission's regulatory authority for their protection. Because the tariff matter provision indicates that the Congress was concerned with the abusive potential inherent in a broad exemption for carrier practices implementing collective bargaining agreements we cannot ascribe to that body the intention to exclude concerted activity from Commission scrutiny, while preserving the Commission's regulatory authority over the much less threatening practices of a single carrier, absent some clear indication. Such a result would be plainly inconsistent with the manifest purposes of the Shipping Act. See *FMC* v. *Svenska Amerika Linien*, 390 U.S. 238, 243 (1968) (noting that the shipping laws permit concerted activity among shippers by granting antitrust immunity, but only at the cost of subjecting agreements

among carriers to Commission review); *Plaquemines Port, Harbor and Term. Dist.* v. *FMC*, 838 F. 2d 536, 542-43 (D.C. Cir. 1988) (same). It is not surprising that the only relevant legislative history is directly to the contrary.

Finally, we cannot accept the petitioners' argument that the Commission's interpretation of the tariff matter provision, which makes section 5 an exemption from section 15 only, frustrates Congress's apparent intent to exempt maritime labor agreements from all the provisions of the shipping laws. In addition to the obvious constraint that the tariff matter provision was intended to have some limiting effect, it would not be incongruous for section 5 to preclude only Commission scrutiny of agreements that would otherwise be subject to the preimplementation filing and approval requirements of section 15. Although we need not decide whether the effect of the exemption is so limited, it is clear that Congress was primarily concerned with the pressures that the procedures of section 15 put on the collective bargaining process. *See California Cartage Co.* v. *United States*, 721 F 2d 1199, 1206 (9th Cir. 1983). Indeed, the original House bill was drafted as an amendment to section 15, and the House Report states that the legislation was intended primarily "to exclude collective bargaining agreements and certain other related agreements from the filing requirements of Section 15." H.R. REP. No. 876, *supra*, at 7.

The Senate was narrowly concerned with reversing the Supreme Court's decisions in *PMA* and *Volkswagen*. *See* S. REP. No. 854, *supra*, at 7-10. As we have noted above, both of these cases held that, under section 15, carriers could not implement potentially anticompetitive agreements prior to FMC approval, even though they arose out of or were related to collective bargaining agreements.

The House bill also included "miscellaneous other deletions of Shipping Act jurisdiction over labor-related matters, " *id.* at 10, however. Opponents of the bill testified before the Senate that those other deletions "went beyond what was necessary to assure free and unfettered collective bargaining . . . ." *id.* The Senate agreed, and added the tariff matter provision.

Against this legislative and judicial background, we are quite unprepared to say that the Commission's interpretation of the MLAA is inconsistent with Congressional intent. We therefore hold that the Commission properly exercised jurisdiction over the Rules as incorporated in tariffs, and deny the petition for review in No. 82-1347.

III. Labor Policy And The Shipping Laws

On the merits, the principal dispute between the parties concerns the extent, if any, to which the Commission is required to take "labor policy considerations" into account in determining the validity of the Rules under the Shipping Act. Petitioners have also preserved for review their challenge to the Commission's conclusion that, when only transportation conditions are considered, the tariffs incorporating the Rules are unreasonable and unjustly discriminatory. We briefly consider this latter argument first.

The validity of the Rules as tariffs when only transportation conditions are considered has not been briefed thoroughly by any of the parties to this proceeding. The petitioners have, instead, referred us to the brief they filed before the Commission in connection with its review of the ALJ's decision. Consequently, the only arguments before us are directed to the points raised by the Commission's Hearing Counsel and by the opponents of the Rules, and not to the Commission's disposition of them. Nonetheless, we have reviewed petitioners' arguments in light of the FMC's later opinion.

Both the ALJ and the Commission held that "[t]he refusal to release containers to consolidators or to accept them without striping and restuffing [as required by the Rules,] . . . since . . . unjustified by transportation conditions, would, without more, violate [the shipping laws.]" *Initial Decision*, 22 Shpg. Reg. Rep. at 1684; *see 50-Mile Rules*, 24 Shpg. Reg. Rep. at 461-67. The ALJ further concluded:

> The rules at issue here have as their sole basis the preservation of work for members of the ILA. They are arbitrary in the sense that the nature of the commodity has no bearing on the application of the rules and the conditions of transportation are at best incidental to the purpose of the

> rule. The Rules were not prompted by conditions attendant to the transportation of cargoes affected by them . . . .

Initial Decision, 22 Shpg. Reg. Rep. at 1687.

Before the Commission, the petitioners argued that the case made out by the opponents of the Rules suffered from numerous and "pervasive errors" of law, and was unsupported by substantial evidence. Specifically, they argued that (1) NVOs and other entities against which the Rules allegedly discriminate are not "shippers" entitled to the protections of the shipping laws; (2) there was no unlawful "discrimination" because the Rules do not require "disparate treatment" of "similarly situated" entities: (3) those against whom the Rules allegedly discriminate had "failed to establish the injury upon which they predicate their case"; and (4) the opponents failed to prove that the Rules were unreasonable.

None of these contentions truly addresses transportation conditions that would justify otherwise discriminatory practices; instead, they challenge the rather obvious conclusions that can be gleaned from examination of the Rules. On their face, the Rules require disparate treatment of various classes of shippers without reference to any transportation needs that even arguably support the distinctions made. We, therefore, find it unnecessary to discuss any of the petitioners' contentions in detail. The Commission's lengthy decision clearly shows that each is utterly without support in Commission precedent or relevant judicial decisions. With respect to the sufficiency of the evidence before the Commission, we agree with the agency that, "[u]nder the circumstances of this case, in which carriers publishing facially discriminatory and burdensome tariffs have not attempted to defend them by reference to transportation considerations, it is sufficient that the testimony supports and confirms the evidence provided by the text of the Rules themselves." *50-Mile Rules*, 24 Shpg. Reg. Rep. at 460. Thus, in order to prevail in this case, the petitioners must demonstrate that the Commission erred in confining its inquiry to transportation considerations and refusing to consider labor policies.

The petitioners contend that the Commission's refusal to consider labor policies was erroneous for a number of reasons.

First, they argue that this issue was definitively resolved by our decision in *CONASA* and that the Commission is therefore precluded from relitigating it here. Relatedly, petitioners claim that even if principles of issue preclusion do not apply, *CONASA* and other decisions have demonstrated at least that some consideration of labor policies is required in cases of this type. Finally, they contend that, notwithstanding section 5 of the MLAA, federal agencies have a duty to harmonize diverse statutory programs in such a way as to give effect to the distinct, even conflicting, policies and objectives underlying those programs. In their view, the requirements of the shipping laws, which prohibit only "unreasonable," "unjust," or "unfair" practices and "unjust" or "undue" discrimination, can be interpreted in such a way as to accommodate both shipping policies and labor policies. In refusing to fashion such an accommodation, they argue, the Commission has unlawfully shirked its responsibilities.

The Commission, for its part, argues first that this court's decision in *CONASA* does not control this case, and that in any event, the passage of the MLAA, which by its terms did not apply in *CONASA*, prohibits it from considering "labor factors" as a justification for carrier practices that otherwise violate the shipping laws as the Commission has historically applied them. Alternatively, the Commission contends that the "labor tests" proposed by the petitioners are unworkable and irreconcilable with the policies of the shipping laws. Finally, assuming that it is required to reconcile the policies of the labor laws with the policies of the shipping laws, the Commission argues that the remedy it has ordered does precisely that because it avoids impinging upon the process of collective bargaining between the ILA and its employers more than is necessary to effectuate the policies of the shipping laws. We consider these opposing arguments in turn.

A. *Does* CONASA *control*?

In *CONASA*, as we have seen, the court held that the Commission properly exercised jurisdiction over the Rules. We remanded the case, however, because

> [t]he Commission did not examine the implications of two recent Supreme Court decisions, [*PMA*], which asserts the importance of labor policy in reaching substantive shipping

> law decisions, 435 U.S. at 57. . . and *[ILA I]*, which discusses the role of collective bargaining in resolving the problems created by technological job displacement. In the interests of justice, the FMC should have the opportunity to reconsider its previous determination in light of these two decisions.

CONASA, 672 F.2d at 189.

On remand the Commission reaffirmed its decision and terminated the proceedings. We then vacated the Commission's order on remand, concluding:

> It appears that the Commission is now engaged in a "broad scale proceeding examining the lawfulness of practices of numerous carriers . . . arising out of the '50-mile rules' contained in the present . . . collective bargaining agreements." The Commission has referred that proceeding to an Administrative Law Judge for detailed fact-finding based on a full evidentiary record.
>
> Because the information developed in that investigation may shed further light on the shipping law issues involved in [this case], and because action by the Supreme Court [on a petition for certiorari in this case] might affect the Commission's jurisdiction over these cases, we vacate the Commission's order that these proceedings be discontinued. The Commission should defer further action [in this case] until it has reached its final decision in its [other investigation] and until the Supreme Court has concluded its action in this case.

CONASA, Supplemental Order on Remand, 21 Shpg. Reg. Rep. (P & F) 1057 (D.C. Cir. July 2, 1982).

From the order of remand and this supplemental order on remand, petitioners conclude that *CONASA* "clearly mandated consideration of labor factors" and therefore precludes the Commission from relitigating the matter. They seize upon two footnotes in our initial opinion in *CONASA*. In one we said that "[a]lthough the legislative standards are different, some of the policy factors germane to the NLRB's decision should also be

taken into account by the FMC in its shipping law determination." 672 F.2d at 181 n.80. In the other, we stated that "[t]he necessity of the collective bargaining provisions at issue is a factor that the FMC should consider in making its substantive determination of legality." *Id.* at 188 n.135.

The doctrine of issue preclusion forecloses "relitigation of both issues of law and issues of fact if those issues were conclusively determined in a prior action." *United States* v. *Stauffer Chemical Co.*, 464 U.S. 165, 170-71 (1984). An issue of law is "conclusively determined" if, in a prior action between the parties, it has been "actually litigated and determined by a valid and final judgment, and the determination is essential to [that] judgment." *Hastings* v. *Judicial Conference of the United States*, 829 F.2d 91, 98 (D.C. Cir. 1987) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982)); *see also Montana* v. *United States*, 440 U.S. 147, 153 (1979); *National Treasury Employees Union* v. *IRS*, 765 F.2d 1174, 1176 (D.C. Cir. 1985).

We cannot agree that *CONASA* precludes the Commission from litigating the question whether it is required to factor labor policies into its substantive shipping law analysis. That this important question under the shipping laws was not "actually litigated" in *CONASA* was made plain in our opinion. We explicitly noted that "the merits of the FMC's decision [were] not before us upon review." *CONASA*, 672 F.2d at 179 n.67; *see id.* at 179 ("Petitioners . . . have addressed their briefs solely to the jurisdictional question . . . ."). Thus, the court itself neither vetted nor even discussed the implications of *PMA* and of *ILA I* in either its initial opinion or its Supplemental Opinion on Remand. We remanded the case, moreover, not because we decided that the Commission had improperly excluded labor policies in its decision on the merits, but because the Commission had not had an opportunity to consider *whether* intervening Supreme Court decisions required it to accommodate shipping policies to labor policies. Hence, we instructed the Commission to "examine the implications," if any, of the Supreme Court's decisions in *PMA* and *ILA I;* we did not order the Commission to apply a legal rule that the court itself

discerned from those intervening cases.[7] *CONASA* was, therefore, not a case in which a remand was necessary because intervening legal developments determined, or even clearly affected, the question in issue, *viz.* whether the Commission is *required* to factor labor policies into its substantive shipping analysis.

In *ILA I*, for example, the Supreme Court had expressly declined to consider *any* shipping law considerations. 447 U.S. at 512. In *PMA*, the Court had noted that "[b]ecause the Commission also has the power to approve filed agreements [under section 15 of the 1916 Act], even though anticompetitive, the Commission *may* also take into account any special needs of labor-management relationships in the shipping industry." 435 U.S. at 63 (emphasis added). Plainly, neither of these decisions resolved the issue presently before us.

The petitioners also point to representations the Commission made to this court in its motion for summary affirmance of its order discounting the *CONASA* investigation. In that motion, the Commission argued that the investigation reviewed in *CONASA* was properly discontinued because the agency's newly instituted investigation in Docket No. 81-11, the action presently before this court, "would be a much more appropriate vehicle for any meaningful further action with respect to carriers' implementation of the 50-mile rules." More to the petitioners' point, however, the Commission also stated that "[f]ollowing this Court's opinion . . . the 'Interim Report and Order' [in Docket No. 81-11] was modified to ensure that 'the parties may present evidence and otherwise address the nature and extent of any labor policy consideration which *might* affect the lawfulness of the Container Rules under the sections of the Shipping Acts here at issue . . .' "

Our Supplemental Opinion on Remand, like the initial opinion, makes clear that we did not determine what standards the

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[7] In his decision, which the petitioners support and the Commission reversed, the ALJ noted that:

> One thing is clear, the Court of Appeals [in *CONASA*] was unhappy with the Commission's treatment of the so-called labor issue in *Sea-Land*. The Court did not, however, give even the slightest hint as to just what it was in the Commission's handling of the issue that caused it concern.

Initial Decision, 22 Shpg. Reg. Rep. at 1676.

Commission was required to apply in its investigation; instead, that opinion reflects only our agreement with the Commission that Docket No. 81-11 was a "much more appropriate vehicle" for a complete and thorough examination of the question. *See CONASA*, Supplemental Opinion on Remand, 21 Ship. Reg. Rep. at 1058. That being the case, we vacated the Commission's admittedly less than thorough decision on that issue on remand. The grounds for our decision in both the initial decision and the Supplemental Opinion on Remand were substantially identical; given the importance of the labor policy issue to the administration of the shipping laws, the Commission had not given appropriate or thorough consideration to the question. The Commission, after considering the effect of intervening legal developments, remained entirely free, as far as the court was concerned, to bring its best judgment to bear in the first instance on the argument that labor policy considerations must play an integral part in its shipping law calculus. The appropriate allocation of authority between agencies and the courts demanded no less, and a fair reading of our opinions in *CONASA* suggests no more.

We proceed to consider petitioners' other objections to the Commission's decision.

B. *Do Other Precedants Guide?*

Petitioners, claiming that every court to have addressed the issue has said that labor factors should be taken into account by the Commission, direct our attention to *PMA; Volkswagen*, 390 U.S. at 283-91 (Harlan, J., concurring); and *New York Shipping Ass'n* v. *FMC*, 495 F.2d 1215, 1222 (2d Cir. 1974). The first-cited decision endorsed the Commission's practice of exempting certain collective bargaining agreements from the filing requirement of Section 15, in deference to national labor policy; it did not consider whether the Commission is required to analyze non-exempt agreements, or carrier practices implementing them, in any way different than it would other filings under section 15. In *Volkswagen*, the Court reversed the Commission's decision to exempt from filing under section 15 an agreement among carriers to impose a per-ton charge upon shippers in order to fund an obligation, agreed to in collective bargaining "to mitigate the impact upon employees of technological unemployment." In his sepa-

rate opinion, Justice Harlan allowed that the ensuing Commission review "must be circumscribed by the existence of labor problems that it is not equipped to resolve." *Volkswagen*, 390 U.S. at 287. Far from indicating that the FMC should specifically consider the labor context underlying a filing, however, Justice Harlan was clear that "[t]he real difficulty in this case is . . . to define the Commission's jurisdiction in such a way that . . . the Commission will not improperly be brought into labor matters where it does not belong." *Id.* at 286.

As for *New York Shipping Ass'n*, the dictum there that labor interests "demand the Commission's continuing attention throughout the process of investigating the status of the agreement under [sections] 16 and 17," and the court's attempt to identify each portion of the agreement as having "relatively more impact on the collective bargaining process and relatively less on competitive conditions in the industry," or vice versa so that some would be subject to and some exempt from the requirements of the shipping laws, are not helpful either to petitioners or to this court. That was a section 15 case of pre-implementation review of a collective bargaining agreement, a procedure dropped from the law by the 1984 Act because of the problems it created for collective bargaining.

In sum, there is no guiding, much less binding, precedent on the point before us.

C. *Does the MLAA Alter Substantive Shipping Law Analysis?*

The Commission ruled that, in enacting the MLAA, Congress intended to preclude the agency from considering labor policies under the shipping laws. *50-Mile Rules*, 24 Shpg. Reg. Rep. at 440. The petitioners, by contrast, argue that because the MLAA is solely concerned with the scope of the Commission's jurisdiction over matters contained in or related to maritime labor agreements, "[i]t necessarily does not implicate the substantive provisions" of the shipping laws.

Not a word in the text of the MLAA supports the view that it bars the Commission from considering labor policies. Indeed, the Commission's argument is essentially that the MLAA implic-

itly amended the substantive provisions of the shipping laws.[8] Such an indirectly accomplished amendment is not lightly to be inferred, of course, in any case. *Cf. Morton* v. *Mancari*, 417 U.S. 535, 550-51 (1974) . It is quite impossible in this case, where the legislative history clearly demonstrates that Congress intended the MLAA to have no effect on the substantive provisions of the shipping laws.

The bill that became the MLAA was introduced in response to complaints from both labor and management that the Supreme Court's decisions in *Volkswagen* and *PMA* "undermined the national labor policy of encouraging the peaceful resolution of labor disputes through collective bargaining by transforming such bargaining into a process of adjudicatory confrontation before the Federal Maritime Commission." S. Rep. No. 854, *supra*, at 9. They therefore argued that maritime labor contracts and all agreements among carriers implementing such contracts should be categorically exempt from the Commission's jurisdiction under section 15 of the 1916 Act. This position was adopted in the House bill. *See* H.R. REP. No. 876, *supra*, at 2 ("This legislation will eliminate the jurisdiction of the FMC to review or require the filing of collective bargaining agreements and agreements incidental to collective bargaining.").

Recall, however, that the Senate received testimony from those opposing a blanket exemption from the Commission's jurisdiction for all practices contained in or related to collective bargaining agreements. Such an exemption, they argued, went beyond what was necessary to protect the collective bargaining process and seriously undermined the protections available to shippers under the shipping laws. The Senate responded to these concerns by amending the House bill to include the tariff matter provision. In doing so, the Senate Report stated that, while the purpose of the MLAA is to ensure "that the maritime industry is not deprived of the express national policy of free and unfettered bargaining without government intervention," the tariff matter provision likewise guaranteed that the Commission's "jurisdic-

[8] Prior to the passage of the MLAA, the Commission did not interpret the substantive provisions of the shipping laws to prohibit it from considering labor policies. *See Sea-Land*, 21 F.M.C. at 4.

tion is preserved to the extent necessary to ensure equal treatment of shippers, cargo, and localities, and to prevent abuses made possible by . . . concerted activity of ocean carriers and others." S. REP. No. 854, *supra*, at 10. The Report went on to emphasize that, in "preserving" the Commission's jurisdiction over tariff matters, "the bill *retains the existing protections of the Shipping Act for shippers*, carriers and localities which may be adversely affected by shipping practices which may arise out of maritime labor agreements." *Id.* at 11 (emphasis added). It is thus clear that Congress did not contemplate that the MLAA would effect any substantive change in the shipping law standards to be applied by the Commission in determining the validity of carrier practices that must be published in tariffs. We therefore cannot accept the Commission's argument that the MLAA bars it from considering labor policies under the shipping laws.

We note with interest that this is not a case in which the Commission lays claim to any deference for its interpretation under *Chevron, U. S. A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842-45 (1984). In light of the foregoing legislative history, such deference would be inadequate to the Commission's purpose in any event. But it would also be inappropriate for us to defer to the agency where, as here, it is interpreting not the meaning of a statute that Congress has charged it to administer, but rather a statute merely delimiting its jurisdiction as against that of the authorities charged with administration of the labor laws. Judicial deference to an agency's interpretation of a statute is required under *Chevron* when Congress has not spoken clearly to the precise question the agency must consider in the course of its administration of that statute. While it is true that Congress was silent in the MLAA regarding the Commission's responsibility to accommodate labor policies, the statutes that the Commission "administers" in determining whether carrier practices are "unjust" "undue" or "unreasonable" is not the MLAA but the substantive shipping laws. Thus, congressional silence on this issue in this statute does not make it ambiguous in any way relevant to the issue, and does not authorize the Com-

mission to fetter itself with imaginative interpretations shielded from *de novo* review. •

D. *Reconciling Labor Policies and Shipping Policies*

Passing the claim that the MLAA bars consideration of labor matters under the shipping laws, the Commission's alternative argument is that, under those laws, labor policies may be considered only in fashioning an appropriate remedy for practices that cannot be justified by reference to "traditional transportation factors." In other words, labor policies are relevant not to the "liability," but only to the remedial, phase of the proceeding. Before turning to its merits, we address briefly the standard under which we review this interpretation of the shipping laws.

1. Standard of Review

The applicable provisions of the shipping laws make no mention of labor policies; nor does any party maintain that the legislative history of these statutes provides a clear indication of a congressional purpose with respect to the question we must presently answer. Absent some authoritative guidance from Congress, or another controlling consideration, it would seem that our task under the second step in *Chevron* is to decide only whether the Commission's interpretation of the statutes it is entrusted to administer is a permissible or "reasonable" one.

The petitioners argue that the deferential test of *Chevron* does not apply, however, because the question presented is a

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• As we have said in the more usual but analytically indistinguishable context of an agency displaying its creative powers to expand its discretion:

> [I]t seems highly unlikely that a responsible Congress would implicitly delegate to an agency the power to define the scope of its own power. When an agency's assertion of power into new areas is under attack, therefore, courts should perform a close and searching analysis of congressional intent, remaining skeptical of the proposition that Congress did not speak to such a fundamental issue.

American Civil Liberties Union v. *FCC*, 823 F.2d 1554,1567 n. 32 (D.C. Cir. 1987); *see National Wildlife Federation* v. *ICC*, No. 86-1317 , slip op. at 9 n.6 (D.C. Cir. June 10, 1988); *Kokechik Fisherman's Ass'n* v. *Secretary of Commerce*, 839 F.2d 795, 807 (D.C. Cir. 1988) (Starr, J., dissenting); *see generally* Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of* Chevron's *Step Two*, 2 ADMIN. L.J.— (forthcoming 1988); Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 467-68 (1987).

"pure question of law." They further contend that the requirements of the shipping laws must be reconciled with the policies of the labor laws, and that the process of doing so is "peculiarly a judicial function, since it requires the weighing and harmonizing of different congressional goals and policies." In their view, we must review the Commission's interpretation of the shipping laws *de novo.*

We do not disagree that the Commission should not trench unnecessarily upon the policies underlying the federal labor laws. When the purposes of the shipping laws it administers can otherwise be accomplished, the Commission must take care not to create tension between the labor and shipping obligations of carriers. *See Burlington Truck Lines* v. *United States,* 371 U. S. 156, 172-74 (1963). It does not follow, however, that in order to ensure against that possibility we must review the Commission's interpretation of its organic legislation under a more stringent standard of review than is mandated by *Chevron.*

Whatever weight labor policies must be given in this case, the matter under review remains the Commission's application of the shipping laws to the Rules, not a pronouncement on the validity of the Rules under the labor statutes. Although the manner in which the Commission has interpreted the shipping laws may have important consequences for the collective bargaining relationship between the ILA and the carriers, so too may the interpretation given a myraid of laws by many different agencies concerned with such matters as pensions, taxation of benefits, antitrust policy, and so on. In this case, the legality of the Rules as a matter of labor law has been established conclusively by the Supreme Court; there may be many other laws that the Rules, with equal cretainty, do not offend. Our concern, and that of the Commission before us, is solely with the requirements of the shipping laws, and such allowance, if any, as *the shipping laws* make to accommodate national labor policy. Thus, in this case as in any other, the shipping laws "constitute[] the immediate frame of reference within which the Commission operates . . . and the policies expressed in [them] must be the basic determinants of its action." *Denver & R.G.W.R. Co.* v. *United States,* 387 U. S. 485, 493-94 (1967) (quoting *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 80 (1944)). And "[i]t is the Commission that in the first in-

stance must determine whether, because of certain compelling considerations, a carrier is relieved of its usual statutory duty . . . " *See Local 1976, United Bhd. of Carpenters and Joiners*, 357 U. S. 93, 109 (1958) (hereinafter *Sand Door*). That being the case, and because the Commission may not in any event "abandon an independent inquiry into the requirements of its own statute and mechanically accept standards elaborated by another agency under a different statute for wholly different purposes," *id.* at 111, our review remains a matter of checking the Commission against the terms of the shipping laws. This is precisely the type of appellate exercise governed by *Chevron;* our review must be correlatively deferential. [10]

Congress has unmistakeably delegated to the Commission initial authority to resolve the kind of issue before us today, subject to our review for fidelity to the broad purposes of the shipping laws. For, as we have seen, the Rules at issue must be published in a signatory carrier's tariff, and thus, fall within the jurisdiction of the Commission pursuant to section 5 of the MLAA. The Commission has applied the laws it administers to the Rules, and our only task is to determine whether, in doing so, the Commission has interpreted the statute in a manner not in derogation of the Congressional policies it expresses. It matters not whether the issue before us can be characterized as a "pure question of law" or something else; Congress has not spoken to the question, and since it can fairly be characterized as falling within the authority Congress has delegated to the Commission, we are simply not at liberty to substitute our judgment for that of

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[10] The Supreme Court's pre-*Chevron* decision in *PMA* is also instructive, but to the same effect, on the appropriate allocation of interpretive authority between the FMC and reviewing courts in this precise context where the need for harmony with another regime, beyond the special ken of the Commission, is called for:

> . . . Congress [committed] to the Commission the initial task of approving or disapproving all agreements that control, regulate, prevent, or destroy competition. However much the courts might consider [the interpretation of the shipping laws] to be a judicial function, particularly when it is necessary to accommodate the possibly conflicting policies of the labor and shipping laws, we have no warrant to ignore congressional preferences written into § 15 of the Shipping Act.

PMA, 435 U.S. at 61.

the agency that must administer these laws on a day-to-day basis. *United Food and Commercial Workers Union, Local 23*, 108 S. Ct. at 426-27 (Scalia, J., concurring); *cf. Burlington Truck Lines*, 371 U.S. at 169. "Reasonableness," therefore, is the measure of our review.

Nonetheless, this case does differ in one respect from the generality of cases in which we are called upon to review an agency's interpretation of a statute pursuant to *Chevron*. The FMC "has not been commissioned to effectuate the policies of the [shipping laws] so single-mindedly that it may wholly ignore other and equally important Congressional objectives." *Southern Steamship Co.* v. *NLRB*, 316 U. S. 31, 47 (1942). As the Supreme Court has repeatedly emphasized, "[f]requently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task." *Id.; see FTC* v. *A.P.W. Paper Co.*, 328 U.S. 193, 202 (1946); *McLean Trucking*, 321 U.S. at 80.

Therefore, for its interpretation of the shipping laws to be considered "permissible" or "reasonable," the commission must adequately explain not only why its interpretation is consistent with the shipping laws, but also why it accomplishes the accommodation required (or, alternatively, why no accommodation is possible), and why any alternative, more accommodating interpretations were rejected.

In order to do this, the Commission must identify the relevant labor policies that are to be accommodated, a task quite clearly beyond the Commission's claim of expertise and outside *Chevron's* rationale for deferential review. Hence, we give no special deference to its interpretation and identification of those policies. *See Sand Door*, 357 U. S. at 108-10; *Department of the Treasury* v. *Federal Labor Relations Authority*, 837 F.2d 1163, 1167 (D.C. Cir. 1988) ("[W]hen an agency interprets a statute other than that which it has been entrusted to administer, its interpretation is not entitled to deference."); *Professional Airways Sys. Specialists* v. *Federal Labor Relations Authority*, 809 F.2d 855, 857 n.6 (D.C. Cir. 1987). It necessarily follows that if the Commission

has interpreted the labor laws in a fashion that undervalues or overlooks the policies those laws seek to promote, its attempt to determine whether and to what extent those policies can be reconciled within the framework of the shipping laws cannot be considered reasonable. *See Southern Steamship Co.*, 316 U. S. at 46-48

2. The Commission's "Accommodation" of Labor Policies

As we have seen, both the ALJ and the Commission concluded that the Rules were unreasonable and unjustly discriminatory when analyzed, as tariffs must be, under the "transportation considerations" that have historically informed the Commission's substantive shipping law analysis. The ALJ went on to conclude, however, that these violations may be "excused" if: (1) the practices were the product of good faith collective bargaining; (2) the bargaining was over a subject of legitimate labor concern; (3) there was no conspiracy between labor and management; and, most significantly, (4) the resulting harm to shippers from allowing the practices to be implemented is outweighed by the harm to labor interests in enjoining the practices. *Initial Decision*, 22 Shpg. Reg. Rep. at 1683.

On review, the Commission rejected the ALJ's analysis for several reasons. First, relying on cases decided under the Interstate Commerce Act, the Commission noted that

> common carriers in other transportation modes have not been excused from their statutory obligations on the basis of collective bargaining agreements with their employees. . . . [A] common carrier may not bargain away such duties in a labor agreement and then defend its actions on the grounds that it served a greater public interest by avoiding a strike and preserving "labor peace."

50 *Mile Rules*, 24 Shpg. Reg. Rep. at 455.

Second, the Commission concluded that, in order for "an outwardly discriminatory or burdensome practice" to be considered "reasonable" within the meaning of the shipping laws, it must be justified by "recognized transportation conditions . . . such as peculiarities in the nature of the transportation needs of the cargo, competition from other carriers, insufficient cargo to

warrant service at a particular port, or conditions at a port or other facility that truly are beyond the carrier's control." In the Commission's view, a "collective bargaining agreement and labor peace on the docks should [not] be considered together with 'traditional' transportation factors in determining whether the Rules are reasonable." To do so "would permit the carriers to bargain with the union without any incentive to safeguard their fundamental common carrier obligations." *Id.* at 455-56

Finally, the Commission regarded the four-part test used by the ALJ as "contrary to the policies underlying the MLAA, because [it] would require [the agency] to return once again to making findings of fact regarding the collective bargaining process and to rendering interpretations of the National Labor Relations Act." *Id.* at 456. More fundamentally, however, the Commission rejected the ALJ's purported comparison of benefits and burdens as "totally unworkable" because it "requires the Commission to compare inherently unlike factors, such as labor gains against shipping losses." *Id.* at 459.

Nonetheless, the Commission recognized that it should, if possible, interpret the shipping laws in a manner that gives effect to the policies underlying both these laws and the labor laws. It concluded, however, that in this case, "because the National Labor Relations Act does not apply . . . in either its terms or its underlying policies, there exists only . . . a 'false conflict' that the FMC is not obliged to resolve by attempting to blend the two bodies of law." *Id.* at 459. The Commission also concluded that even if it were appropriate to accommodate "labor interests," there was no "reasonable or feasible methodology" by which this could be done, consistent with its obligations under the shipping laws. *Id.* at 459.[11] The Commission also recognized that any remedy it ordered would affect the collective bargaining relationship be-

[11] Analogizing to principles for dealing with conflicts of law, the Commission cited with approval one commentator's suggestion that

> in cases of "true conflicts" that cannot be resolved by restrained interpretations of the discordant statutes, the deciding forum should resolve the case before it by fully applying its own law and the underlying conflict, in a democracy, should be resolved through the political process and not by the courts.

50-Mile Rules, 24 Shpg. Reg. Rep. at 459 n.52. *See* Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 Duke L.J. 171, 176.

tween the ILA and the carriers. It concluded that labor policies could be considered in fashioning a remedy, and that the remedy chosen should be "precise and narrowly drawn" so as to minimize the impact upon that relationship.

The primary thrust of petitioners' challenge to the Commission's conclusions, as outlined above, is that the exclusion of labor factors from the Commission's analysis prior to its remedial stage creates unnecessary conflict between the shipping laws and the labor laws, in derogation of the Commission's duty to accommodate the two regimes. More specifically, they contend that the Commission's conclusion that the labor laws are not implicated in this case is nothing less than an "ostrich-like denial of reality," because in declaring the Rules unlawful, the Commission effectively "nullified" the rights of ILA members to preserve their work. Such a result, they argue, is necessary neither to vindicate the policies of the shipping laws nor to ensure that the technological efficiencies of containerization are made fully available to the shipping public. They further contend that the Commission's exclusion of labor policies contravenes the Supreme Court's express instructions to administrative agencies in *McLean Trucking*, 321 U.S. at 80:

> [I]n executing th[e] policies [of its organic statute, an agency] may be faced with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with different problems in view. When this is true, it cannot, without more, ignore the latter. The precise adjustments which it must make, however, will vary from instance to instance depending on the extent to which Congress indicates a desire to have those policies leavened or implemented in the enforcement of the various specific provisions of the legislation with which the [agency] is primarily and directly concerned.

The petitioners point out that in the shipping laws, the relevant portions of which are reproduced in Appendix B to this opinion, Congress chose not to make it unlawful for a carrier to burden or discriminate among shippers under any and all circumstances, but only when the result is "unjust," "undue," or "unreasonable." Thus, they argue, the proscriptions of the ship-

ping laws are not "hard and fast" rules, and a carrier's obligations under those laws are not in any sense "absolute." The capacity and suppleness of the statutory language make it clear, they suggest, that Congress intended that the Commission would make the type of "precise adjustments" for labor policies in its shipping law determinations that the Court held the ICC was required to make for antitrust policies in *McLean Trucking*. They conclude that

> since the Rules vindicate work preservation rights guaranteed by Congress, the Commission must uphold them unless they go beyond the realm of reasonableness. Evaluation of reasonableness requires consideration of a variety of factors, including the history of the challenged provisions, the evil they seek to remedy, the underlying reasons for their adoption, the ends they seek to achieve, and the effects of their implementation.

In short, the issue before us is the extent to which the Commission must consider petitioners' interests in work preservation when evaluating the reasonableness of the Rules.

We discern three types of cases that raise the question whether an agency is required to accommodate the policies of another statutory regime within the framework of the legislation it administers. In the first category, a regulated party argues that conduct that violates the terms of the agency's organic statute is privileged under the terms of another statute. These may be styled "false conflict" cases, because there is no anomaly if conduct privileged under one statute is nonetheless condemned by another; we expect persons in a complex regulatory state to conform their behavior to the dictates of many laws, each serving its own special purpose. In cases of this type, an administrative agency need not make any "accommodation" to the constraints that other laws place upon the regulated person.

The second category differs from the first in one critical respect: the regulated party's conduct, in violation of the agency's organic statute, is not merely privileged under another statute; it discharges an affirmative obligation or involves the exercise of a right guaranteed thereunder. The agency enforcing its statute is thus faced with what we shall call a "true conflict," although it is

not to be confused with that phrase as it used in other contexts. In such a case, the agency must fully enforce the requirements of its own statute, but must do so, insofar as possible, in a manner that minimizes the impact of its actions on the policies of the other statute.

In the third category of cases, an agency is required by its own organic law to consider congressional policies articulated in other statutes. Its mandate to regulate in "the public interest" incorporates an obligation to consult those aspects of the public interest reflected in statutes administered by others. These "incorporation" cases differ from cases of alleged conflict principally in that the question for the court is not whether an agency "accommodation" is required, but whether Congress intended the agency to consult the public interest more broadly than an exclusive focus on the purposes served by its organic legislation would allow.

The "false conflict" category is illustrated by a series of cases in which regulated common carriers entered into "hot cargo" agreements with the union representing their employees.[12] In *Galveston Truck Line Corp.* v. *Ada Motor Lines, Inc.*, 73 M.C.C. 617 (1957), a motor carrier complained to the ICC that connecting trunk-line carriers had refused to accept and forward interline shipments tendered to them by short-line carriers. The truck-line carriers claimed that their actions were "justified by reason of the [hot cargo] terms of their labor contracts, and the labor situation in existence at the time." 73 M.C.C. at 620. The ICC rejected these arguments, concluding that the carriers

> gave preferential effect to the demands of the union representatives over their duties and obligations to the public, and their claim that their actions were in the best interests of the public as a whole, in that they were able to continue service to most of their many customers, is shallow indeed, even assuming that they had a right to make a

[12] Prior to the 1959 amendments to the NLRA, an employer could lawfully agree to a union's demands that it refuse to handle the goods of other employers that the union deemed to be unfair to labor. Unions could not, however, enforce these "hot cargo" agreements through economic pressure on the employer. *See Sand Door*, 357 U.S. at 106-08. The 1959 amendments to the NLRA made hot cargo clauses unlawful. *See Burlington Truck*, 371 U.S. at 171.

> determination as to which customers to serve and which to refuse.

Id. at 628.

The crucial import of *Galveston* is that a regulator of common carriers will not condone conduct that violates the terms of its organic statute merely because that conduct may be lawful under another statutory regime. As the ICC noted, "[w]e are here concerned, not with the legality of the 'hot cargo' clauses as such, but with the actions of the defendant carriers in relation to their obligations under the Interstate Commerce Act to the public, without regard to the terms of any contract which they may have executed with a third party." *Galveston*, 73 M.C.C. at 625-26; *see also Merchandise Warehouse Co.* v. *A.B.C. Freight Forwarding Corp.*, 165 F. Supp. 67, 76 (S.D. Ind. 1958) (carrier must "insist upon contractual terms with the Union that will permit [it] to fulfill i[ts] duties" under applicable regulatory laws); *Pickup and Delivery Restrictions, California, Rail*, 303 I.C.C. 579, 594 (1958).

In *Sand Door*, the Supreme Court approved and generalized the foundation upon which *Galveston* rested by emphasizing that the policies of diverse statutory regimes are best preserved if each agency scrupulously avoids deciding questions of law or policy that more properly lie within the jurisdiction of another agency, when a more limited inquiry into the requirements of its own statute is sufficient to dispose of the question before it. Thus, the Court, per Justice Frankfurter, endorsed the ICC's approach:

> It is significant to note the limitations that the Commission was careful to draw about its decision in the *Galveston* case. It was not concerned to determine, as an abstract matter, the legality of hot cargo clauses, but only to enforce whatever duty was imposed on the carriers by the Interstate Commerce Act and their certificates. The Commission recognized that it had no general authority to police such contracts, and its sole concern was to determine whether a hot cargo provision could be a defense to a charge that the carriers had violated some specific statutory duty.

357 U.S. at 109. By the same token, the Court disapproved the NLRB's contention that hot cargo provisions contained in

collective bargaining agreements should be deemed unlawful, not solely because of policies underlying the labor laws, but also because, "by entering a contract not to handle the goods the [employer] carrier violates its obligations under the Interstate Commerce Act to provide nondiscriminatory service and to observe just and reasonable practices." *Id.* at 109. The Court approached the question not in terms of whether the NLRB's interpretation of the Interstate Commerce Act was correct, but in terms of its institutional competence to interpret that Act at all:

> [O]ther agencies of government, in interpreting and administering the provisions of statutes specifically entrusted to them for enforcement, must be cautious not to complicate the [ICC's] administration of its own act . . . .
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> * * *
>
> Whether a carrier has without justification failed to provide reasonable and nondiscriminatory service is a question of defining the carrier's duty in the framework of the national transportation policy. Whether there is a "strike or concerted refusal," or a "forcing or requiring" of an employer to cease handling goods is a matter of the federal policy governing labor relations. The Board is not concerned with whether the carrier has performed its obligations to the shipper, but whether the union has performed its obligation not to induce employees in a manner proscribed by [the NLRA]. Common factors may emerge in the adjudication of these questions, but they are, nevertheless, distinct questions involving independent considerations.

Id. at 109-10.

In *Burlington Truck Lines*, the Court reaffirmed its decision in *Sand Door*, noting that "[i]mplicit in its analysis is a recognition that if either agency is not careful, it may trench upon the other's jurisdiction, and because of lack of expert competence, contravene the national policy as to transportation or labor relations." 371 U.S. at 173. Like *Galveston*, *Burlington Truck Lines* involved unionized motor carriers' refusal to provide interline service to non-union carriers, pursuant to the hot cargo clauses in

their collective bargaining agreements. To meet this situation, the boycotted carriers formed a new company, which then applied to the ICC for authority to act as an interstate motor carrier. The ICC granted the application, finding that the failure of the existing carriers to fulfill their statutory responsibilities justified certificating an additional carrier to serve "the present and future public convenience and necessity." *Id.* at 161.

The Court did not question the ICC's conclusion that the unionized carriers violated the Interstate Commerce Act by refusing to accept the shipments tendered to them. Indeed, it noted with approval that "[t]he [ICC] declared that it was not attempting to adjudicate a labor dispute or trench upon the jurisdiction of the National Labor Relations Board, and it conceded its lack of jurisdiction to look beyond the duties of carriers to the public under the terms of the Interstate Commerce Act." *Id.* at 161. In this respect, therefore, *Burlington Truck* is indistinguishable from *Galveston*, and is most appropriately regarded as a "false conflict" case.

The Court had noted probable jurisdiction in *Burlington Truck* not to review the Commission's determination that the carriers' conduct violated the Interstate Commerce Act, however, but "because of important questions raised as to the relationship and interplay between remedies available under the Interstate Commerce Act and under the [NLRA]." *Id.* at 158. The ICC might have remedied the service inadequacies by issuing a narrow cease and desist order against carrier obedience to hot cargo agreements.[13] A three judge district court had concluded nonetheless, that although additional certification was the more far-reaching of the remedies available to the ICC, it was

> a permissible remedy which was not made unavailable merely because the reason for inadequacy of service was that "existing carriers [were] subordinating their public service obligations to their collective bargaining agreements."

Id. at 164 (quoting the district court).

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[13] At the time the ICC had rendered its decision, "[t]he union was free to [appeal to carriers not to handle hot cargo,] absent inducement of employees, and as far as the labor laws . . . were concerned, the employers were free to reject or accede to such requests." *Id.* at 170.

Before the Supreme Court, the unionized carriers and the union argued that the ICC's choice of a remedy under the Commerce Act created unnecessary tension with the policies of the NLRA. In essence, they argued that the remedy created a "true conflict" between the two regimes. A cease and desist order, they argued, would have completely remedied the service inadequacies, and thus fully implemented the Commerce Act, without thrusting the ICC into labor relations that more properly lay within the jurisdiction of the NLRB.

The Court held that ICC had failed to provide a reasoned explanation for choosing to certify an additional carrier instead of issuing a cease and desist order—a particularly egregious omission in light of the labor policy arguments presented by the union and the carrier employers. The Court rejected the ICC's argument that a cease and desist order would not have been effective because the unionized carriers' attempt to comply with such an order "might in some way 'so aggravate their labor difficulties as to cause a complete cessation of operations.'" *Id.* at 169. The carriers' compliance with hot cargo clauses might make service to the public inadequate.

> But it was precisely at this point that the *Sand Door* case . . . recognized the power of the [ICC] to enter cease-and-desist orders against the carriers' violating the transportation law and their tariffs. Thus, as appellant union argues, there was no reason to have assumed that the ordinary processes of the law were incapable of remedying the situation.

Id. at 170 (footnotes omitted).

The Court did not direct the Commission to enter a cease and desist order, however; the intervening change in the law making hot cargo agreements unlawful required a remand to the ICC, and thus it was not necessary for the Court to determine whether the Commission's chosen remedy actually conflicted with the policies of the NLRA. The Court nonetheless instructed:

> The Commission should be particularly careful in its choice of remedy . . . because of the possible effects of its decision on the functioning of the national labor relations policy. The Commission acts in a most delicate area here, because

> whatever it does affirmatively (whether it grants a certificate or enters a cease-and-desist order) may have important consequences upon the collective bargaining processes between the union and the employer. The policies of the Interstate Commerce Act and the labor act necessarily must be accommodated, one to the other.

Id. at 172.

As we read *Burlington Truck*, an agency, faced with alternative methods of effectuating the policies of the statute it administers, (1) must engage in a careful analysis of the possible effects those alternative courses of action may have on the functioning and policies of other statutory regimes, with which a conflict is claimed; and (2) must explain why the action taken minimizes, to the extent possible, its intrusion into policies that are more properly the province of another agency or statutory regime. Indeed, it was on the heels of its statement that the labor and transportation policies must be "accommodated" that the Court quoted extensively from its opinion in *Sand Door.* It noted that in that case, "[t]he Court concluded that although 'common factors may emerge in the adjudication of these questions' under the two Acts by the two different agencies, nevertheless independent consideration and resolution were possible," such that each agency could concern itself only with the duties imposed upon carriers by its own statute. *Id.* at 173 (quoting *Sand Door*, 357 U.S. at 111).

A true conflict is, of course, more difficult to resolve in cases where the alternatives available to an agency do not admit of independent consideration and resolution of the issues raised under its organic statute and under other legislation. In the face of such an irreconcilable conflict, an agency that doggedly excluded consideration of the regime it does not itself administer could, if not actually make it impossible for a regulated entity to conform its behavior to both regimes, at least abrogate the regulated party's rights or obligations under the other regime. In cases of this type, *Burlington Truck* provides no guidance to the agency.

In *Southern Steamship Co.*, however, the Court confronted just such a conflict. Seamen aboard a ship at dock struck to compel their employer to recognize their union. The company refused, and discharged the strikers for mutiny. The NLRB held

that the company violated the NLRA by refusing to bargain with the union and by discharging the strikers. It ordered the company, *inter alia*, to reinstate the discharged strikers with back pay. The Court upheld the Board's ruling that the employer had violated the NLRA by refusing to bargain with the union. It held, nonetheless, that the Board abused its discretion in ordering the company to reinstate the strikers.

The Court rejected the Board's remedy because it determined that, under the federal law making mutiny a crime, the strike "was unlawful from its very inception." 316 U.S. at 48. In *Southern Steamship*, that is, unlike *Galveston*, there was a true conflict between the two statutes in question. Under the labor law, the employees had a right to bargain and to strike to enforce that right against a recalcitrant employer; under the mutiny statute, however, it was a crime to exercise the right to strike while on board a vessel in navigable waters. In these circumstances, the Court, although it acknowledged the "considerable breadth" of the Board's authority to impose such remedies "as will effectuate the policies of the [NLRA]," observed that

> the Board has not been commissioned to effectuate the policies of the Labor Relations Act so singlemindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

Id. at 47.

This passage might seem to imply that in some cases, the terms of an agency's organic statute must give way in the face of another, equally compelling statutory command. This implication was squarely rejected by the Court, however, in *Sand Door*:

> Presumed illegality under the mutiny statute was not used to establish a violation of the labor statute. It was relied on to establish an abuse of discretion in giving a remedy. Much less was there any suggestion that the Board should abandon

> an independent inquiry into the requirements of its own statute and mechanically accept standards elaborated by another agency under a different statute for wholly different purposes.

357 U.S. at 111; *see also FTC* v. *A.P.W. Paper Co.*, 328 U.S. 193 (1946). The lesson of *Sand Door* is that, where an irreconcilable conflict is presented, the agency should not shrink from pursuing its statutory mandate. Rather, it should attempt to accommodate the policies of the other statute only in fashioning a remedy.

The final category, "incorporation" cases, is exemplified by the Supreme Court's decision in *McLean Trucking*. There the Court reviewed the ICC's approval of a merger among seven large motor carriers, over the Department of Justice's objections that the consolidation would be anticompetitive. The Court held that while the ICC "has no power to enforce the Sherman Act [or to] decide definitively whether the transaction contemplated [by parties subject to ICC regulation] constitutes a restraint of trade or an attempt to monopolize which is forbidden by that Act," 321 U.S. at 79, the agency was nonetheless required to consider competition policy in determining whether a proposed consolidation of motor carriers served the public interest. The breadth of the ICC's statutory mandate, as well as indications that Congress regarded competition in the regulated motor carrier industry as "still a value," required no less. *See id.* at 85. At the same time, the ICC was not required or authorized to import antitrust standards wholesale into its substantive analysis implementing the national transportation policy: "the policies of the antitrust laws determine 'the public interest' in [motor carrier] regulation only in a qualified way." *Id.* at 83.

> The [ICC's] task is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facilities and problems. That legislation constitutes the immediate frame of reference within which the [ICC] operates; and the policies expressed in it must be the basic determinants of its action.
>
> But in executing those policies the [ICC] may be faced with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with

> different problems in view. When this is true, it cannot, without more, ignore the latter. The precise adjustments which it must make, however, will vary from instance to instance depending on the extent to which Congress indicates a desire to have these policies leavened or implemented in the enforcement of the various specific provisions of the legislation with which the [ICC] is primarily and directly concerned.

Id. at 79-80. Thus, in an incorporation case, it is the requirements of the agency's organic legislation, informed by the use of traditional sources for discerning congressional purpose, that determines the play other statutory policies have in agency adjudications. *See California* v. *FPC*, 369 U.S. 482, 484-85 (1962); *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 94 (1953).

As our discussion of these cases demonstrates, in order to determine the extent, if any, to which the FMC is required to accommodate labor polices in its substantive shipping law analysis in this case, we must address the following questions. First, does the Commission's decision that the Rules are unlawful derogate rights secured to the carriers, their employees, or the ILA under the labor laws? If so, is there any other interpretation of the shipping laws that would better preserve these rights without in any way undermining the Commission's statutory mission? Alternatively, if the labor laws do not give any of the petitioners a right to implement the Rules, did Congress intend the Commission to take account, under the broad terms of its organic statutes, of important labor policies arguably served by the Rules?

The petitioners and intervenor West Gulf Maritime Association contend that this is not a case of false conflict, like the "hot cargo" cases, which involved labor agreements that could not be enforced against an employer through union self-help. They distinguish those cases as implicating "no established right nor congressional policy embodied in the labor statutes." This is a case, they argue, of true conflict, of incorporation, or of a combination of the two. We agree that, *if* the labor laws entitle the petitioners to the benefit of the Rules (unlike a hot cargo clause), or *if* Congress intended labor factors to count under the shipping

laws, then this is not a case of false conflict, and the Commission was under a duty to account for labor policies in its decision.

The Commission itself clearly regarded this case as involving merely a "false conflict," concluding that its decision in no way undermined rights guaranteed in or the policies underlying the labor laws. It further concluded that its inquiry into the reasonableness of the Rules was strictly limited under the shipping laws to consideration of transportation factors, in which labor considerations play no part. In the terms the Supreme Court used in *Burlington Truck*, the Commission determined in essence that "independent consideration and resolution" of the shipping law and the labor law issues raised by the Rules were indeed possible. In its brief, the Commission emphasizes that in post-MLAA litigation,

> there is a bright line between maritime collective bargaining agreements, which are judged by the NLRB under the labor laws without regard to the interests of persons not party to the collective bargaining process, and ocean tariffs resulting from such agreements which, in their application to such outside persons, should be judged by the FMC under the shipping laws in a manner consistent with those statutes' historical purpose of protecting the customers of the carriers and not the carriers themselves.

Thus, consistent with *Galveston*, *Sand Door* and *Burlington Truck*, the Commission held that to consider labor factors in its substantive shipping analysis would be inconsistent with its statutory responsibilities. We agree.

The labor laws were adopted to promote "the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation." *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 211 (1964). To that end, those laws promote and regulate the collective bargaining process; they most emphatically do not impose upon or guarantee to employers and workers specific terms and conditions of employment. *Cf. H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970). That the employees have a right to bargain to retain work traditionally within their union's jurisdiction—unquestionably a right guaranteed by the labor laws, *see ILA I*, 447 U.S. at

504—does not, as petitioners seem to suggest, guarantee them a substantive right to preserve that work. The carriers were not, under the express or implied terms of the labor laws, obligated to accede to the union's work preservation demands. *See* 29 U.S.C. § 158(d) (1982) (duty to bargain in good faith "does not compel either party to agree to a proposal . . ."). Rather, Congress left the substantive terms and conditions governing the employment relationship to be resolved by the respective parties through the process of collective bargaining, backed by the economic weapons available to them.

Courts and administrative agencies therefore "must take great care not to disturb [their] attempts at selfgovernance unless those attempts contravene the law." *International Longshoremen's Ass'n* v. *NLRB*, 613 F.2d 890, 914 (D.C. Cir. 1979), *aff'd*, *ILA I*, *supra*. It has never been suggested, however, that the parties' freedom of contract, or the public interest in their maintenance of industrial peace by contract, are themselves factors in determining whether their negotiated product "contravenes the law." It is not the national labor policy to allow otherwise unlawful activity merely because an employer and a union have agreed to it in mandatory collective bargaining. *See, e.g., United Mine Workers* v. *Pennington*, 381 U.S. 657, 665 (1965) ("because they must bargain does not mean that the agreement reached may disregard other law") (citing *Teamsters Union* v. *Oliver*, 358 U.S. 283, 296 (1959) and *Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, 399-400 (1947)); *see also PMA*, 435 U.S. at 71 (Powell, J., dissenting) ("The parties [to a collective bargaining agreement] cannot agree to terms that violate the law . . . ."). The common carrier obligations of an employer are logically anterior to its duty to bargain, and accordingly, must frame the limits of that bargaining.

The Commission's decision does not nullify the rights of the ILA or the carriers under the NLRA. It does not prohibit them from bargaining for the preservation of the ILA's jurisdictional work, nor does it purport to limit in any way the ILA's use of its available economic weapons to force the carriers to agree to its demands on the subject of containerization and work preservation. On the contrary, the Commission limited its inquiry to those carrier practices that affect the carriers' relations with the

shipping public, purposefully eschewing any analysis that would require it to regulate the collective bargaining process.

This is not to say that the Commission's decision may not affect the relationship between the carriers and the ILA; indeed, it is possible that the parties will be unable to negotiate mutually acceptable work preservation terms that conform to that decision. As we have seen, however, the labor laws do not guarantee them any happier result; if the carriers and the ILA are unable to reach an enforceable agreement on work preservation, it is not because the Commission has failed to "accommodate" labor policies, but only because it has refused to indulge what, in its view, the Congress has clearly proscribed. *Cf. Sand Door*, 357 U.S. at 110-11. This case cannot be meaningfully distinguished, therefore, from *Galveston*, *Burlington Truck*, and *Sand Door*, on the ground that the Rules, unlike the hot cargo clauses in those cases, implicate an "established right [or] congressional policy" of work preservation.

Nor does the threat of extended labor unrest, and its effect on the carriers' ability to comply with their shipping law obligations, justify the carriers' agreement to implement the allegedly unlawful provisions of the Rules. As the ICC concluded in *Galveston*:

> [I]t may not be assumed that any resistance [sic] on the part of the [carriers] to becoming the media through which the objectives of the union were to be accomplished would have provoked a general strike against their entire operations. In any event, if common carriers should be confronted with this dilemma their obligation to continue to render service to all without undue discrimination must be regarded as paramount.
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> * * *
>
> To approve the position of [the carriers] would accord them and other carriers similarly situated immunity from violations of the Interstate Commerce Act, and substitute for the regulation of interstate common carriers now vested in this Commission an indirect control by labor organizations.

73 M.C.C. at 628-29; *see Pickup and Delivery Restrictions, California, Rail*, 301 I.C.C. at 593-95. Although labor unrest may make make it "impossible or impracticable" for a carrier, exercising due diligence, fully to perform its statutory responsibilities in discrete circumstances, *see Quality Drug Stores, Inc.* v. *Eastern Freight Ways, Inc.* 123 M.C.C. 198, 202 (1975), the carriers cannot agree, out of fear of such unrest, to a tariff regime of discriminatory or unreasonable practices. *Id.* at 203.

We must also reject the petitioners' suggestion that the terms of the shipping laws are so capacious that Congress intended that "labor factors" be included in the Commission's shipping law calculus, thus rendering the Commission's narrower interpretation of those laws unreasonable. What we have said above demonstrates that the Commission's decision is not so "inconsistent" or "overlapping" with the policies of the labor laws as to indicate, without more, that Congress may have desired the Commission to consider the extent to which "those policies [should be] leavened or implemented in the enforcement of the various provisions of the [shipping laws]." *Cf. McLean Trucking*, 321 U.S. at 80, 83-85. Petitioners have not brought to our attention any indications to the contrary in the statutes or their legislative histories.

Shipping law terms such as "unjust," or "unreasonable," are indeed broad and may plausibly admit consideration of a number of competing policies. It is well-established, however, that "[t]he primary objective of the shipping laws administered by the FMC is to protect the shipping industry's customers, not members of the industry." *Boston Shipping Ass'n* v. *FMC*, 706 F.2d 1231, 1238 (1st Cir. 1983). Of the protections afforded shippers under these laws, the prohibition against tariffs that unreasonably discriminate among or impose burdens on them has been identified as one of the Commission's "primary concerns." *Pacific Maritime Ass'n* v. *FMC*, 543 F.2d 395, 409 (D.C. Cir. 1976), *rev'd on other grounds, PMA, supra*; *see also* H.R. REP. No. 53, 98th Cong., 2d Sess. 4 (1984) ("The primary role of the FMC [is] to review conduct in order to protect carriers, shippers, and ports from unfair or discriminatory shipping practices.").

Further informing their meaning, moreover, the prohibitions of the shipping laws against "unjust" or "unreasonable" practices track those of the Interstate Commerce Act, "and where dissimilarities in the respective modes of transportation do not warrant a different construction, the Shipping Act should be construed in the light of similar provisions of the Commerce Act." *North Atlantic Mediterranean Freight Conference*, 11 F.M.C. 202, 209 (1967) (citing *Far East Conference* v. *United States*, 342 U.S. 570 (1952)); *see Inter-Island Steam Navigation Co.* v. *Territory of Hawaii*, 305 U.S. 306, 312 n.9 ("In its general scope and purpose, as well as its terms the [Shipping Act] . . . closely parallels the Interstate Commerce Act; and we cannot escape the conclusion that Congress intended that the two acts, each in its own field, should have like interpretation, application and effect."). The decisions of the ICC, as we have discussed above, have held that neither a carrier's obligations under a collective bargaining agreement nor the threat of labor unrest makes reasonable an otherwise unreasonable discrimination in service, regardless of whether the collective bargaining agreement in question is lawful so far as the labor laws are concerned. *See Burlington Truck*, 371 U.S. at 161; *Galveston*, 73 M.C.C. at 625-26. More generally, the Supreme Court has held that the primary purpose of the proscriptions of the Interstate Commerce Act is to "protect[] . . . those who pay or bear the rates. *The standards it establishes are transportation standards, not criteria of general welfare.*" *Texas & P. Ry.* v. *United States*, 289 U.S. 627, 638 (1933).

We think it not unreasonable that the Commission limited the justifications that will render outwardly discriminatory or burdensome practices "reasonable" within the meaning of the shipping laws to similar standards. As we have stated just recently, for an agency's interpretation of its organic statute to be considered permissible under *Chevron*, that interpretation need only be not "inconsistent with the statutory mandate [and not] . . . frustrate the policy that Congress sought to implement." *Continental Air Lines*, 843 F.2d at 1453 (quoting *Federal Election Comm'n* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981). The petitioners have offered us nothing that suggests the Commission's interpretation has either of these forbidden results. Indeed, if the agency interpreted the shipping laws to admit

labor policies in justification for practices that discriminate against or burden certain sectors of the shipping public, with no basis in transportation conditions, then its interpretation might well frustrate the policies of the shipping laws, and hence, be unreasonable under *Chevron*. Even if the policies of the labor laws extended some affirmative protection to the Rules, there is nothing in the shipping laws that would permit the Commission to give preference to those policies when to do so would undermine Congress's purpose of allowing only such discriminations and burdens on shippers as can be justified by transportation conditions. As the Supreme Court stated in *Sand Door*, an agency may not "abandon an independent inquiry into the requirements of its own statute and mechanically accept standards elaborated by another agency under a different statute for wholly different purposes." *Sand Door*, 357 U.S. at 111.

In addition, it could not be plainer that "independent consideration and resolution" of the labor law issues and shipping law issues that arise from the operation of the Rules is possible. *See Burlington Truck Lines*, 371 U.S. at 173; *Sand Door*, 357 U.S. at 110. In *ILA I*, the Court made it clear that it was unnecessary to consider shipping law policies in determining whether the Rules were a valid work preservation agreement under the labor laws. 447 U.S. at 512. As if to underscore that point, the Court specifically admonished the NLRB for considering the effects of the Rules on parties outside the bargaining unit, which the Court said were "irrelevant." *Id.* at 507 n.22. Indeed, in *ILA II*, the Court repeated that admonition in even stronger terms, stating that the NLRB had "committed [a] fundamental error[ ] . . . by focusing on the effect the Rules may have on 'shortstopping' truckers and 'traditional' warehousers, . . . contraven[ing] our direction that such extra-unit effects 'no matter how severe,' are 'irrelevant' to the [work preservation] analysis." *ILA II*, 473 U.S. at 79 (quoting *ILA I*, 447 U.S. at 507 n.2).

Thus, on remand, the ALJ rejected the argument of those opposing the Rules that the carriers did not have the "right of control" over the work in question—an essential element in a proper work preservation analysis under the labor laws—because the carriers could not lawfully comply with the Rules under the terms of the shipping laws; to give effect to FMC precedent

"would be mischievous in the present posture of the case." *International Longshoremen's Ass'n,* Decision and Supplemental Decision, at 72 (NLRB Sept. 29, 1981). He continued:

> [C]lear guidelines have not been called to [the] attention of this writer suggesting when and under what circumstances one agency should defer to the determination of the other. Hence an extension of comity to FMC in this instance would rest on little more than that Agency's having acted first. Such a fortuity seems a dubious predicate ". . . for careful accommodation of one statutory scheme to another . . ." and for Board abdication ". . . of its immediate task" and other important rights conferred by the legislature.
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> * * *
>
> It may well be that in the final analysis, the adverse impact on shipping interests brought about by the Rules on Containers will be afforded primacy and deemed a controlling element of analysis of [labor law] issues. However, there being no cognizable authority as to which policy serves the public interest in more compelling fashion, reconciliation of the conflict would seem beyond the province of the administrative agencies.

Id. at 75 (quoting *Southern Steamship Co.*, 316 U.S. at 47) (footnote omitted; ellipses in original). On petitions for review, the Fourth Circuit implicitly agreed with the ALJ, *see American Trucking Ass'ns* v. *NLRB*, 734 F.2d 966, 976, 978 (4th Cir. 1984), *aff'd, ILA II, supra*, and when the case returned to the Supreme Court, it noted that this issue was not before it. *ILA II*, 473 U.S. at 70 n.10.

While we do not agree with the ALJ that there is a true conflict between the labor laws and the shipping laws, we believe his observations are fundamentally sound. Each agency, within the scope of its respective jurisdiction, is concerned with specific legislative policies, and each agency's analysis is defined with reference to those policies. For example, it cannot seriously be disputed that the "extra-unit effects" of the Rules that the Court held were "irrelevant" under the labor laws, are relevant to the Commission's shipping law analysis. The tests proposed by the petitioners and the intervenor concede as much. By the same to-

ken, the Commission has no proper concern with the ILA's intention in insisting that the carriers agree to the Rules, which is the critical factor in the labor law determination; the shipping laws are simply not concerned with questions concerning whether labor-management activities are more properly regarded as "primary" or "secondary" activity. Any inquiry into questions of this type would "improperly" thrust the Commission "into labor matters where it does not belong." *PMA*, 390 U.S. at 286 (Harlan, J., concurring).

The Commission is concerned with the Rules only insofar as they surface as practices in carrier tariffs; it is irrelevant to it that the Rules also perform a different office, insofar as they govern the relationship between the carriers and their employees. Thus, agency scrutiny of the Rules under the labor laws and under the shipping laws, respectively, is not only non-overlapping; from what can be gleaned from the decisions of the NLRB and of the courts applying the labor laws, they are completely disjunctive.

Mindful of both the Supreme Court's efforts in *Sand Door* and *Burlington Truck* to ensure that one agency's determinations do not unnecessarily "trench upon" the jurisdiction of another, and of the deference we owe an agency's interpretation of its governing legislation, we conclude that the Commission's decision not to take labor considerations into account except in fashioning a remedy is reasonable.

IV. CONCLUSION

The Commission properly exercised jurisdiction over the Rules as incorporated in the tariffs of the signatory carriers. We have found no error in the Commission's determination that the Rules were unlawful under the shipping laws. We therefore deny both petitions for review.

It is so ordered.

APPENDIX A

The relevant portions of the Rules on Containers are as follows:

Definitions

* * *

(f) Qualified Shipper—means the manufacturer or seller having a proprietary financial interest (other than in the transportation or physical consolidation or deconsolidation) in the export cargo being transported and who is named in the dock/cargo receipt.

(g) Qualified Consignee—means the purchaser or one who otherwise has a proprietary financial interest (other than in the transportation or physical consolidation or deconsolidation) in the import cargo being transported and who is named in the delivery order.

(h) Consolidated Container Load—means a container load of cargo where such cargo belongs to more than one shipper on export cargo or one consignee on import cargo.

RULE 1—*CONTAINERS TO BE LOADED OR DISCHARGED BY DEEPSEA ILA LABOR*

A) Cargo in containers referred to below shall be loaded into or discharged out of containers only at a waterfront facility by deepsea ILA labor:

1. Containers owned, leased or used by carriers . . . which contain consolidated container loads, which come from or got to any point within a geographic area of any Management Port described by a 50-mile circle with its radius extending out from the center of each port . . . (hereafter "geographic area") or

2. Containers which come from a single shipper which is not the manufacturer ("manufacturer's label") into which the cargo has been loaded (consolidated) by other than its own employees and such containers come from any point within the "geographic area," or

3. Containers designated for a single consignee from which the cargo is discharged (deconsolidated) by other than its own employees within the "geographic area" and which is not warehoused in accordance with Rule 2 (b).

* * *

C) All export consolidated cargo, described in 1 (A) (1) and (2) above, shall be received at the waterfront facility by deepsea ILA labor and such cargo shall be loaded into a container at the waterfront facility for loading aboard ship.

D) All import consolidated cargo described in 1 (A) (1) and (3) above, shall be discharged from the container and the cargo placed on the waterfront facility where it will be delivered and picked up by each consignee.

E) No carrier or direct employer shall supply its containers to any consolidator or deconsolidator. No carrier or direct employer shall operate a facility in violation of the Rules on Containers which specifically require that all Rule 1 containers be loaded or discharged at a waterfront facility.

RULE 2—*CONTAINERS NOT TO BE LOADED OR DISCHARGED BY ILA LABOR*

Cargo in containers referred to below shall not be loaded or discharged by ILA labor:

A) Export Cargo:

1. All cargo loaded in containers outside the "geographic area."
2. Containers loaded with cargo at a qualified shipper's facility with its own employees.
3. Containers loaded with the cargo of a single manufacturer (Manufacturer's label) at its facilities with its own employees.
4. Consolidated container loads of mail, household effects of a person who is relocated his place of residence, with no other type of cargo in the container, or personal effects of military personnel.

5. There shall be no general warehouse exception applicable to export cargo.

B) Import Cargo:

1. All cargo discharged from containers outside the "geographic area."

2. Containers discharged at a qualified consignee's facility by its own employees.

3. Consolidated container loads of mail, household effects of a person who is relocating his place of residence, with no other type of cargo in the container, or personal effects of military personnel.

4. Containers of a qualified consignee discharged at a bona fide public warehouse within the "geographic area" which comply with all of the foregoing [sic] conditions:

    1. The container cargo is warehoused at a bona fide public warehouse;

    2. The qualified consignee pays the normal labor charges in and out; and the normal warehouse storage fees for a minimum period of thirty or more days; and stores the cargo for a minimum period of 30 days; and

    3. The cargo [is] being warehoused (a) in the normal course of the business of the qualified consignee; (b) title to such goods has not been transferred from the qualified consignee to another

* * *

APPENDIX B

Section 14 Fourth of the Shipping Act, 1916, 46 U.S.C. § 812 (1982):

> No common carrier by water shall . . .
>
> Fourth. Make any unfair or unjustly discriminatory contract with any other shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities . . . .

Section 16 First of the Shipping Act, 1916, 46 U.S.C. § 815 (1982):

> It shall be unlawful for any common carrier by water . . .
>
> First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . . .

Section 17 of the Shipping Act, 1916, 46 U.S.C. § 816 (1982):

> No common carrier by water in foreign commerce shall demand, charge or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports . . . .
>
> Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property.

Section 18 (a) of the Shipping Act, 1916, 46 U.S.C. § 817 (a) (1982):

> Every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to the . . . manner and method of . . . delivering property for transportation, . . . the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property.

Section 10 (b) (6) and 10 (b) (11)-(12) of the Shipping Act, 1984, 46 U.S.C. §§ 1709 (b) (6) (C) and (b) (11)-(12):

> (b) No common carrier, either alone or in conjunction with any other person, directly or indirectly, may—
>
> > (6) except for service contracts, engage in any unfair or unjustly discriminatory practice in the matter of—
> >
> > > (C) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage;
> >
> > (11) except for service contracts, make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever;
> >
> > (12) subject any particular person, locality, or description of traffic to an unreasonable refusal to deal or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 10 (d) (1) of the Shipping Act, 1984, 46 U.S.C. § 1709 (d) (1):

> No common carrier, ocean freight forwarder, or marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

APPENDIX B
Decision of Federal Maritime Commission

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-11

"50 MILE CONTAINER RULES" IMPLEMENTATION BY OCEAN COMMON CARRIERS SERVING U.S. ATLANTIC AND GULF COAST PORTS

Ocean common carriers' publication and implementation of "50 Mile Container Rules" found to be unreasonable and violative of the Shipping Act, 1916, the Shipping Act of 1984 and the Intercoastal Act, 1933.

Opponents of the Rules not required to prove specific financial harm in order for the Rules to be found unlawful.

The Commission not required by statute or case law to attempt to weigh "labor considerations" in adjudicating possible Shipping Act violations; on the contrary, to do so would frustrate intent of Congress in enacting Maritime Labor Agreements Act of 1980.

The appropriate role for "labor considerations" is in the choice of remedy for Shipping Act violations; here, effective date of cease and desist order against further enforcement of the Rules on Containers will be delayed for 90 days so that respondent carriers can conform collective bargaining obligations with requirements of the Shipping Acts.

Dennis N. Barnes for respondent Moller Steamship Co.

James W. Pewett and *Russell T. Weil* for respondent Central Gulf Lines, Inc.

Frederick L. Shreves for respondent Dart Containerline Company, Ltd.

William Karas for respondents Atlantic Container Line Ltd. and Puerto Rico Maritime Shipping Authority.

David N. Dunn, Charles F. Warren and *George A. Quadrino* for respondents Japan Line, Ltd., Kawasaki Kisen Kaisha, Ltd.,

Mitsui O.S.K. Lines, Ltd., Nippon Yusen Kaisha and Yamashita Shinnihon Steamship Co., Ltd.

Seymour H. Kligler and *David A. Brauner* for respondents Empresa Lineas Maritimas Argentinas, S.A., Orient Overseas Container Line, and South African Marine Corp., Ltd.

Richard A. Hagan and *Peter J. King* for respondent Companhia de Navegacao Lloyd Brasileiro.

Robert J. Remmer for respondent Coordinated Caribbean Transport, Inc.

John P. Love for respondents American Atlantic Lines and Pan Atlantic Lines.

John H. Dougherty and *Neal M. Mayer* for respondent Trans Freight Lines, Inc.

Robert S. Zuckerman, Oliver J. Trytell and *John M. Ridlon* for respondent Sea-Land Service, Inc.

William P. Verdon, Thomas D. Shea and *Daniel W. Lenehan* for respondent United States Lines, Inc.

Stanley O. Sher for respondents Costa Line, Hapag-Lloyd Aktiengesellschaft, Italian Line and Nedlloyd Lines.

Richard E. Hull for respondent Transporte Navieros Ecuatorianos (TRANSNAVE).

Derek A. Walker for respondent Venezuelan Line.

R. Lawrence Kurt for respondent Lykes Bros. Steamship Co., Inc.

C.P. Lambos and *Donato Caruso* for intervenor New York Shipping Association, Inc., and for respondents American Atlantic Lines, Associated Container Transportation (U.S.A.)—Pacific America Container Express, The Bank Line Limited, Barber Blue Sea Line, Coordinated Caribbean Transport, Galleon Shipping Corp., Jugolinija, Koctug Line, Linea Manaure, C.A., Maersk Line, Moore McCormack Lines, Inc., Polish Ocean Lines, Torm Lines, Waterman Steamship Corp. and Yangming Marine Transport Corp.

R. Frederic Fisher for intervenor Pacific Maritime Association.

Francis A. Scanlan for intervenor Council of North Atlantic Shipping Associations.

Raymond P. deMember for intervenors International Association of NVOCCs and The Florida Custom Brokers & Forwarders Association.

Thomas W. Gleason and *Ernest L. Mathews, Jr.*, for intervenor International Longshoremen's Association, AFL-CIO.

Gerald H. Ullman for intervenor National Customs Brokers & Forwarders Association of America, Inc.

William H. Towle for intervenor American Warehousemen's Association.

J. Alan Lips and *Kevin M. Williams* for intervenor American Trucking Associations, Inc.

Charna J. Swedarsky, John Robert Ewers, Aaron W. Reese and *Vern W. Hill* for Bureau of Hearing Counsel.

REPORT AND ORDER

BY THE COMMISSION: (Edward V. Hickey, Jr., *Chairman*; James J. Carey, *Vice Chairman*; Thomas F. Moakley, Francis J. Ivancie and Edward J. Philbin, *Commissioners*).

INTRODUCTION

In this proceeding, the Federal Maritime Commission ("FMC" or "Commission") again confronts, in the words of the Supreme Court, the "difficult and complex problems" posed by the "Rules on Containers" (sometimes known as the "50 Mile Rules"). *NLRB* v. *International Longshoremen's Association*, 447 U.S. 490, 512 (1980). Under the Rules, ocean common carriers providing service in the domestic offshore and foreign commerce of the United States, from Atlantic and Gulf Coast ports, have

placed certain restrictions and conditions on their transportation of containerized cargoes. The restrictions and conditions required by the Rules on Containers are not necessitated by and do not depend upon the nature or transportation needs of a particular shipment of cargo, or upon the operational requirements of the carriers. Rather, the Rules apply as a result of collective bargaining agreements between the carriers and their deepsea longshore employees, represented by the International Longshoremen's Association ("ILA").

It now is established that these underlying agreements between the carriers and the ILA are lawful under the federal labor statutes because they represent efforts to preserve work historically performed by longshoremen against inroads from containerization and related technological advances. The Commission has neither personal jurisdiction over the ILA nor subject matter jurisdiction over the union's collective bargaining agreements with the carriers, and this investigation raises no issue regarding the lawfulness of the agreements.

However, to fulfill their side of the collective bargaining agreements, the carriers, which are within the Commission's jurisdiction, have incorporated the Rules on Containers into their tariffs, as they are required to do by the Shipping Act, 1916 ("1916 Act"), 46 U.S.C. § 801 *et seq.* (1982), its successor, the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. § 1701 *et seq.*, and the Intercoastal Shipping Act, 1933 ("Intercoastal Act"), 46 U.S.C. § 843 *et seq.* (1982).[1] The Rules thus became part of the carriers' terms of contract with cargo shippers and other persons. The task before the Commission is to determine whether, despite their lawfulness as collective bargaining provisions under the federal labor laws, the Rules or, more precisely, the carriers' practices described by the Rules, violate the maritime statutes' prohibitions against unjust discrimination and unreasonable practices in their publication and operation as ocean cargo tariffs.

For the reasons set forth below, the Commission finds that certain provisions of the Rules on Containers are indeed unrea-

[1] For ease of discussion, these statutes will be referenced collectively as "the Shipping Acts," except where a specific citation is necessary.

sonable and unjustly discriminatory and therefore violate the 1916 Act, the 1984 Act and the Intercoastal Act. We therefore reverse the Initial Decision ("I.D.") issued on February 13, 1985, by former Chief Administrative Law Judge John E. Cograve ("Presiding Officer"), which found no violations of law.

Evidence sufficient to find violations of the Shipping Acts can be found in the provisions of the Rules themselves, which are facially discriminatory and burdensome as applied to certain classes of shippers and cargo consolidators. These discriminations and burdens are not justified by transportation circumstances properly cognizable under the Shipping Acts. The evidence provided by the text of the Rules themselves is supported by other evidence of record provided by shippers, warehousemen and consolidators, who testified that the carriers' application of the Rules resulted in specific instances of lost business, unnecessary costs and other types of economic harm to them traceable to the Rules. The criticisms of the I.D. of the testimonial evidence, for the most part, were factually wrong or stemmed from a stringent *ad hoc* probative standard, the application of which was neither supported by law nor justified as a matter of fairness. The total quantum of evidence against the Rules in this case surpasses in some respects the record in *Sea-Land Service, Inc. and Gulf Puerto Rico Lines, Inc.—Proposed Rules on Containers*, 21 F.M.C. 1 (1978), where the Commission found the Rules unlawful as applied to the Puerto Rico domestic offshore trade. In its review of that decision, the U.S. Court of Appeals for the District of Columbia Circuit did not question the adequacy of the evidence supporting the Commission's findings.

In reaching this decision, the Commission rejects the arguments of certain parties that, in determining the lawfulness of the Rules on Containers under the ocean transportation statutes the Commission is responsible for enforcing, we are obliged to reach beyond those statutes and attempt to take into account evidence of "labor considerations" stemming from the collective bargaining agreements between the carriers and the ILA. After a searching analysis of the applicable statutes and case law, the Commission has concluded that no such obligation is placed upon us. On the contrary, our review of the twenty-year history of efforts by this agency, the National Labor Relations Board

("NLRB"), the courts and Congress to reconcile the demands of the federal maritime and labor statutes indicates that any effort by the Commission to balance "labor considerations" against the clear evidence of unreasonable transportation burdens and discriminations before us would represent a failure by the Commission to discharge the duties assigned to us by Congress, and would undermine the balance between labor and shipping interests devised by Congress when it enacted the Maritime Labor Agreements Act of 1980, Pub. L. No. 96-325, 94 Stat. 1021. We believe that our responsibility to take "labor considerations" into account is limited to ensuring that the appropriate remedy for violations of the Shipping Acts is drawn no more broadly than necessary, so as to avoid any unwarranted impact on the legitimate collective bargaining interests of the carriers and the union.

Because civil penalties are not an issue in this proceeding, the remedy for the violations of law the Commission has found will be an order that the carriers cease and desist from publishing in their tariffs and enforcing the relevant provisions of the Rules on Containers. The effective date of the order will be delayed for 90 days from the date of this decision, in order to give the carriers a reasonable amount of time to conform their collective bargaining arrangements with the requirements of the shipping laws. The Commission does not take this step casually, because it requires us to countenance 90 more days of continuing violations of the Intercoastal Act and the 1984 Act with the accompanying burdens upon shippers and other affected persons. However, we are persuaded that this is a reasonable accommodation of the carriers' interests in maintaining a stable relationship with their longshore employees.[2]

The history of this proceeding, the analysis of the Presiding Officer as set forth in his I.D. and the positions of the parties on Exceptions can best be understood if they are viewed in their places as the latest developments in the long chronology of the role of federal labor law in regulation by the Commission under

[2] Rule 8 of the Rules on Containers contemplates a 60-day period for renegotiation if any part of the present agreements between the carriers and the ILA is declared unlawful. Thus, the remedy devised by the Commission allows a full opportunity for renegotiation and also gives the carriers an additional 30 days to take whatever steps are then necessary.

the Shipping Acts, and of the relevant decisions by the courts, the FMC and the NLRB regarding the Rules on Containers. We begin by recounting the history and nature of the Rules themselves.

I. *The Origin and Development of the Rules on Containers* [3]

Prior to the advent of what has come to be termed "the container revolution," the movement of ocean-borne cargo across the port piers contained two distinct stages. Truckers delivered loose or "break-bulk" export cargo to the terminal at the head of the pier. Longshoremen employed by ocean carriers or stevedoring companies then transferred the cargo piece by piece from the tailgate of the truck to the hold of the outgoing ship, checking it, sorting it, placing it on pallets, moving it by forklift to the side of the ship, and lifting it into the ship's hold. This process worked in reverse with regard to import cargo on incoming ships, with the longshoremen removing the cargo from the ship piece by piece and transporting it to the tailgate of the truck, from which point truckers would deliver it (sometimes through intermediate warehouses) to the ultimate consignee.

Following World War II, steamship carriers operating between New York and Puerto Rico began to carry cargo in small (8' x 8' x 8') reusable wooden receptacles called "Conex" and "Dravo" boxes. Initially, these boxes—the forerunners of the modern container—were "stuffed" (loaded) and "stripped" (unloaded) exclusively at the pier by ILA labor. Later, however, steamship companies made the boxes available to shippers and others for stuffing and stripping off-pier by non-ILA labor. By the mid-1950's, larger metal containers began to replace the wooden boxes. In 1958, the first "containership" appeared in the New York-Puerto Rico domestic offshore trade, designed specifically to move containers that ultimately would range up to forty feet in length.

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[3] This section of the Commission's report draws heavily on *American Trucking Associations, Inc.* v. *NLRB*, 734 F.2d 966 (4th Cir. 1984), *aff'd sub nom. NLRB* v. *International Longshoremen's Association*, 473 U.S. 61 (1985); and on *NLRB* v. *International Longshoremen's Association*, 447 U.S. 490 (1980).

From the early days of containerization, its economic advantages to carriers and shippers were clear. The Supreme Court described them as follows:

> The use of containers is substantially more economical than traditional methods of handling ocean-borne cargo. Because cargo does not have to be handled and repacked as it moves from the warehouse by truck to the dock, into the vessel, then from the vessel to the dock and by truck or rail to its destination, the costs of handling are significantly reduced. Expenses of separate export packaging, storage, losses from pilferage and breakage, and costs of insurance and processing cargo documents may also be decreased. Perhaps most significantly, a container ship can be loaded or unloaded in a fraction of the time required for a conventional ship. As a result, the unprofitable in-port time of each ship is reduced, and a smaller number of ships are needed to carry a given volume of cargo.

NLRB v. *International Longshoremen's Ass'n*, 447 U. S. 490, 494-95 (1980) (footnotes omitted). Because of these advantages, steamship carriers embarked upon a massive investment program in automated shipping operations. Billions of dollars were spent for the design and construction of container vessels and for the purchasing or leasing of hundreds of thousands of ocean containers. Carriers, stevedores and terminal operators developed modern container terminals equipped with cranes, heavy forklifts and other machinery required for the handling of container traffic.

By 1959, containerization had begun to make inroads into traditional longshore work. In that year, the first set of collective bargaining negotiations to address the labor issues raised by containerization began. These negotiations between the ILA and the New York Shipping Association ("NYSA"), an employer organization, opened with the union demanding that all containers be stripped and stuffed at the pier by the longshoremen. Ultimately, however, the ILA conceded that any member of NYSA "shall have the right to use any and all type[s] of containers without restriction or stripping by the union." *American Trucking Associations, Inc.* v. *NLRB*, 734 F.2d 966, 970 (4th Cir. 1984), *aff'd sub*

nom. NLRB v. *International Longshoremen's Association*, 473 U.S. 61 (1985). In return, NYSA agreed to pay the ILA royalties on containers stripped or stuffed away from the pier by non-ILA labor. NYSA also agreed that:

> Any work performed in connection with the loading and discharging of containers for employer members of NYSA which is performed in the Port of Greater New York whether on piers or terminals controlled by them, or whether through direct contracting out, shall be performed by ILA labor at longshore rates.

Id.

Despite the 1959 agreement, grievances, work stoppages and wildcat strikes occurred for most of the next decade. At least in part, this state of affairs stemmed from different interpretations by the parties of the 1959 agreement. The ILA claimed that it had agreed to permit the free movement over the pier of only those containers that were "full shipper loads" (FSLs")—*i.e.*, containers holding goods beneficially owned by only one shipper or consignee. With respect to consolidated loads (also called "less than trailer loads" ("LTLs"), or "less than container loads" (LCLs"))—*i.e.*, containers holding goods belonging to more than one shipper or consignee—the ILA contended that it had retained the right to have its members stuff and strip such containers at the pier. The union's concern was focused on off-pier consolidation facilities, which were now beginning to emerge. NYSA, on the other hand, claimed that the agreement essentially left its members free insofar as consolidated loads were concerned, provided they made royalty payments on any loads not handled by ILA labor. The unrest generated by this conflict led NYSA to make this 1962 concession:

> Where a employer-member of NYSA supplies a container which is the property of such member, to a consolidator for loading or discharging of cargo in the Port of Greater New York, it will be stipulated that such container must be loaded or unloaded by ILA at longshore rates.

American Trucking Associations, Inc. v. *NLRB, supra*, at 970.

Appendix B-Decision of Federal Maritime Commission

Throughout the 1960's, containerization assumed an increasingly prominent role on the waterfront. By 1967, containerized cargo constituted 20 percent of all cargo handled in the Port of New York. That year also marked the introduction of the first containership into the important North Atlantic trade route, which previously had been served exclusively by conventional vessels.

With contract negotiations scheduled for the summer of 1968, the ILA in July 1967 adopted a resolution demanding once again that *all* containers be stuffed and stripped by its members. NYSA countered with a demand that all existing restrictions on the free movement of containers be eliminated. A strike ensued, lasting 57 days in the Port of New York and about twice that long in other Atlantic and Gulf ports. Only the appointment of a Presidential Board of Inquiry, pursuant to the emergency provisions of the Taft-Hartley Act, brought the parties back to the bargaining table.

Out of this atmosphere, the Rules on Containers emerged in January, 1969. At that time, the Rules essentially provided that if containers owned or leased by the carriers carrying consolidated LTL or LCL loads were to be stuffed or stripped within a radius of 50 miles of the local port area [4] by anyone other than the employees of the beneficial owner of the cargo—that is, by employees of consolidators, warehousemen, etc.—the work instead must be performed at the piers by ILA labor. The Rules also contained a liquidated damages provision for any container handled in violation of the Rules, and required the carriers to pay a royalty on any container that passed over the pier intact. It seems to be generally accepted that, as a practical matter, the agreement preserved only about 20 percent of the containerized cargo to the longshoremen for stuffing and stripping, with the remaining 80 percent passing over the piers intact. The terms of the 1969 master agreement were adopted by other ports on the Atlantic Coast, including Hampton Roads and Baltimore. In 1970, the liquidated damages provision was increased to $1,000 per violation.

[4] At each port covered by the Rules, the 50-mile radius extends from a point specified by the Rules themselves. For example, in New York, the point is Columbus Circle.

In 1971, after another strike, the ILA and the Council of North Atlantic Shipping Associations ("CONASA"), a new multi-employer bargaining association representing the carriers, renewed the 1969 Rules in virtually identical form.

Despite the existence of the Rules, the ILA maintained that the carriers continued to permit and even encourage violations of them. The union therefore threatened to invoke its right to suspend the Rules, which would mean that the longshoremen might refuse to handle any container that was or was meant to be stripped or stuffed inland. The parties met in Dublin, Ireland in January, 1973, and executed an "interpretive bulletin" to the Rules designed to ensure their effective enforcement. The "Dublin Supplement"—as the bulletin came to be called—declared that the Rules applied to all containers—including FSL containers—that were stuffed or stripped within 50 miles of the port area by anyone other than the beneficial owner's employees. This brought within the ambit of the Rules FSL containers that, although destined for delivery intact to their consignees, were stopped short of their ultimate destinations and stripped at warehouses or trucking stations within the 50-mile zone. The parties agreed to except any FSL container that would be warehoused within the 50-mile zone for a minimum of 30 days. The Dublin Supplement also prohibited the carriers from making their containers available to consolidators.[5] This prohibition had long been sought by the ILA, which regarded containers as extensions of the hold of the ship and thus part of its members' historical work area.

At the conclusion of their 1974 negotiations, the parties agreed to retain the Rules as interpreted by the Dublin Supplement. The ILA continued to claim, however, that there were recurring violations of the Rules by the carriers. In April, 1975, the union suspended the Rules, and longshoremen stripped all containers at the pier except FSLs. After a month, however, the par-

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[5] Rule 1(E) of the Rules on Containers states that the carriers shall not supply their containers "to any consolidator or deconsolidator." The prohibition is not limited, on its face, to consolidators located within the 50-mile zone; however, it has been so interpreted. *E.g., NLRB* v. *International Longshoremen's Association*, 447 U. S. 490, 498-99 (1985). At a minimum, the provision is ambiguous.

ties settled the dispute by eliminating the 30-day warehouse exception as it applied to export cargo and tightening it with regard to import cargo. In October and November, 1977, the ILA again went on strike because of the continued impact of containerization during a period when the Rules were enjoined. A settlement was reached whereby the carriers agreed to defend vigorously the lawfulness of the Rules and to create a new job security program intended to protect carrier contributions to ILA fringe benefit plans. The parties have agreed to retain the Rules in substantively unchanged form ever since, most recently in the collective bargaining negotiations completed in October, 1986. Employer signatories to the collective bargaining agreements with the ILA have included the West Gulf Maritime Association, the Southeast Florida Employers Association and the Mobile Steamship Association; the Rules thus apply along the full range of the Atlantic and Gulf Coasts, although there are individual ports at which the Rules do not apply because the ILA does not have collective bargaining jurisdiction.

The Presiding Officer found that, as of April 1983, an ILA dockworker was paid $14.00 per hour, plus $10.00 in fringe benefits. The cost to the steamship lines for a longshoreman's salary, plus fringe benefits for hospitalization, welfare and pension, was between $40,000 and $45,000 per year for a 40-hour week. Longshoremen received six weeks' vacation, 16 paid holidays and $25,000 of life insurance. In addition, the ILA membership had a Guaranteed Annual Income ("GAI") Program, a Job Security Program and container royalty payments (it is our understanding that certain reductions in these benefits were included in the 1986 contract). The GAI Program paid an unemployed ILA member $35,000 per year, with six weeks vacation and fringe benefits. However, GAI benefits are not uniform and payments at South Atlantic and Gulf ports were lower. The ocean carriers paid container royalties of $3.00/ton on containers not stripped or stuffed by ILA labor, including containers originating from or destined to points outside the 50-mile limit. Two-thirds of the royalties went to Christmas bonuses, which in New York were between $1,500 and 1,800 per person.[8]

[8] I.D. at 28-29.

II. *The Rules On Containers*

This investigation concerns the lawfulness of those provisions of the current Rules on Containers that apply to shippers, consolidators and other persons who did not participate in the collective bargaining between the ILA and the carrier respondents, but whose cargo or businesses nevertheless are affected as a consequence of the carriers' incorporation of the Rules into their tariffs.[7] The fundamental purpose of these provisions is to require cargo that does not qualify for any of the Rules' various exceptions to be delivered loose to the piers so that it can be loaded into or unloaded from containers in the first instance by ILA longshoremen. On import shipments, the carriers are in a position to ensure that this objective is attained by having non-excepted cargo unloaded at the pier in loose form. However, on export shipments, it is possible that non-excepted cargo may arrive at the pier already loaded in containers. Under such circumstances, the container must be stripped at the pier and then restuffed in order to achieve the Rules' objective of work for longshoremen.[8]

The relevant provisions of the Rules are set out below. It will be seen that whether particular cargo is excepted from the Rules, or instead is subjected to their requirements, has little relation to the nature or transportation requirements of the cargo itself, but rather is the product of the bargaining give-and-take over the years between the carriers and the union.

Definitions

* * *

(f) Qualified Shipper – means the manufacturer or seller having a proprietary financial interest (other than in the transpor-

[7] *Boston Shipping Association, Inc.* v. *FMC*, 706 F.2d 1231 (1st Cir. 1983), upheld the Commission's decision that Rule 10 of the Rules on Containers did not unfairly discriminate against the Port of Boston or otherwise violate the Shipping Act, 1916. Rule 10 governs the collection and distribution to ILA members of container royalties. It does not apply to shippers or consolidators and is not under review in this proceeding.

[8] I. D. at 7.

tation or physical consolidation or deconsolidation) in the export cargo being transported and who is named in the dock/cargo receipt.

(g) Qualified Consignee – means the purchaser or one who otherwise has a proprietary financial interest (other than in the transportation or physical consolidation or deconsolidation) in the import cargo being transported and who is named in the delivery order.

(h) Consolidated Container Load – means a container load of cargo where such cargo belongs to more than one shipper on export cargo or one consignee on import cargo.

RULE 1—*CONTAINERS TO BE LOADED OR DISCHARGED BY DEEPSEA ILA LABOR*

A) Cargo in containers referred to below shall be loaded into or discharged out of containers only at a waterfront facility by deepsea ILA labor:

1. Containers owned, leased or used by carriers[9]. . . which contain consolidated container loads, which come from or go to any point within a geographic area of any Management Port described by a 50-mile circle with its radius extending out from the center of each port. . . , (hereinafter "geographic area") . . . or

2. Containers which come from a single shipper which is not the manufacturer ("Manufacturer's label") into which the cargo has been loaded (consolidated) by other than its own employees and such containers come from any point within the "geographic area," or

[9] Although the phrase "(c)ontainers. . . used by carriers" appears to include containers that are owned or leased by shippers, the carriers and the ILA claim that this was not their intention. Rule 1(A) (1) thus is ambiguous on this point. I.D. at 63.

3. Containers designated for a single consignee from which the cargo is discharged (deconsolidated) by other than its own employees within the "geographic" area and which is not warehoused in accordance with Rule 2(b).

* * *

C) All export consolidated cargo, described in 1(A) (1) and (2) above, shall be received at the waterfront facility by deep-sea ILA labor and such cargo shall be loaded into a container at the waterfront facility for loading aboard ship.

D) All import consolidated cargo described in 1(A) (1) and (3) above, shall be discharged from the container and the cargo placed on the waterfront facility where it will be delivered and picked up by each consignee.

E) No carrier or direct employer shall supply its containers to any consolidator or deconsolidator. No carrier or direct employer shall operate a facility in violation of the Rules on Containers which specifically require that all Rule 1 containers be loaded or discharged at a waterfront facility.

RULE 2—*CONTAINERS NOT TO BE LOADED OR DISCHARGED BY ILA LABOR*

Cargo in containers referred to below shall not be loaded or discharged by ILA labor:

A) Export Cargo:

1. All cargo loaded in containers outside the "geographic area."

2. Containers loaded with cargo at a qualified shipper's facility with its own employees.

3. Containers loaded with the cargo of a single manufacturer (Manufacturer's label) at its facilities with its own employees.

4. Consolidated container loads of mail, household effects of a person who is relocating his place of residence, with

no other type of cargo in the container, or personal effects of military personnel.

5. There shall be no general warehouse exception applicable to export cargo.

B) Import Cargo:

1. All cargo discharged from containers outside the "geographic area."

2. Containers discharged at a qualified consignee's facility by its own employees.

3. Consolidated container loads of mail, household effects of a person who is relocating his place of residence, with no other type of cargo in the container, or personal effects of military personnel.

4. Containers of a qualified consignee discharged at a bona fide public warehouse within the "geographic area" which comply with all of the following conditions:

1. The container cargo is warehoused at a bona fide public warehouse;

2. The qualified consignee pays the normal labor charges in and out; and the normal warehouse storage fees for a minimum period of thirty or more days; and stores the cargo for a minimum period of 30 days; and

3. The cargo being warehoused (a) in the normal course of the business of the qualified consignee; (b) title to such goods has not been transferred from the qualified consignee to another.

* * *

RULE 7—*NO AVOIDANCE OR EVASION*

The above rules are intended to be fairly and reasonably applied by the parties. To obtain non-discriminatory and fair implementation of the above, the following principles shall apply:

* * *

(C) Liquidation Damages—Failure to load or discharge a container as required under these rules will be considered a violation of the contract between the parties. Use of improper, fictitious or incorrect documentation to evade the provisions of Rule 1 and Rule 2 shall also be considered a violation of the contract. If for any reason a container is no longer at the waterfront facility at which it should have been loaded or discharged under the Rules, then the carrier or its agent or direct employer shall pay, to the joint Container Royalty Fund, liquidated damages of $1,000 per container which should have been loaded or discharged. If any carrier does not pay liquidated damages within 30 days after exhausting its right to appeal the imposition of liquidated damages to the Committee provided in Rule 9 (a) below, the ILA shall have the right to stop working such carrier's containers until such damages are paid.[10]

(D) Any facility operated in violation of the Container Rules will not have service supplied to it be any direct employer and by the ILA will not supply labor to such facility.

III. *The Shipping Acts and National Labor Policy*

The paramount issue before the Commission is whether, in judging the lawfulness under the Shipping Acts of the above provisions of the Rules on Containers, we must or should take into account "labor considerations," however those are defined. The analysis of the Presiding Officer, the result of the I.D. and the arguments of the contending parties all turn on that question. This part of the Commission's report recounts the long and complex history of the efforts by the Commission, the courts and Congress to reconcile national labor policy with the maritime statutes' prohibitions against unjust discrimination and unreasonable cargo handling practices. Our purposes are (1) to demonstrate the precise nature and limits of the courts' and Congress' concern over the possible impact of FMC regulation on national labor policy; (2) to derive appropriate standards for interpretation of the spe-

[10] While the Rules do not require that liquidated damages paid by a carrier shall be passed on to shippers or other persons, at the same time the Rules do not prohibit a carrier from doing so. At least one carrier respondent apparently notified trucking companies in the Hampton Roads area that it would require reimbursement for any damages it paid. I.D. at 65, n. 49.

cific sections of the Shipping Acts applicable to the Rules on Containers; and (3) to define the actual labor interests embodied in the Rules.

The parties' pleadings and the I.D. made it clear that it was necessary to go back twenty years to the first court decisions defining FMC jurisdiction over labor-related maritime activities. The applicability and proper interpretation of these early cases remain subjects of controversy, even though the results of some of them eventually were undone by legislation. While the Commission's 1978 decision regarding the Rules on Containers as they applied in the domestic offshore Puerto Rican trade and the review of that decision in 1982 by the U.S. Court of Appeals for the District of Columbia Circuit are included in the discussion below, the cases analyzed also focus more generally on agreements and other activities by FMC-regulated persons stemming from collective bargaining agreements.

This history is set forth in strict chronological order, in the belief that that is the best aid to analysis and understanding. The institution of this proceeding in early 1981 will be described in its proper place. To provide the greatest possible assistance to the parties and the public, and to make clear the basis for our ultimate conclusions, we have quoted extensively from the various court decisions and Congressional hearings. We also have included, where appropriate, the Commission's comments regarding the significance of a decision or other development for the current proceeding. Some of these comments are frankly critical of past failures by the Commission to maintain a consistent posture toward labor issues or to articulate clearly our rationale for a particular decision. With this history as a backdrop, we then shall analyze the I.D. and the parties' positions on the labor issue and set forth our conclusions.

A. *The "Volkswagen" Decision*

Regulation by the Commission of labor-related maritime agreements and activities became an important issue for the first time as a result of *Volkswagenwerk* v. *FMC*, 390 U.S. 261 (1968) ("*Volkswagen*"). Prior to that decision, the Commission generally had resisted the notion that it had jurisdiction over such mat-

ters. The case grew out of a collective bargaining agreement reached in late 1960 between the Pacific Maritime Association ("PMA"), an organization of ocean common carriers and other employers of maritime labor (similar to NYSA and *CONASA*), and the International Longshoremen's and Warehousemen's Union ("ILWU"), which is the controlling union at Pacific Coast ports.

PMA and ILWU hoped their agreement would end a long history of labor discord along the Pacific Coast. Similar to the history of the proceeding now before the Commission, these labor problems had arisen from the impact on longshoremen's income and job security caused by the introduction of containerization in the Pacific trades. In return for ILWU's agreement to end its opposition to containerization (manifested by certain restrictive work practices), PMA agreed to create a "Mechanization and Modernization Fund" ("Mech Fund"), which was to be used to mitigate the impact of longshore unemployment caused by containerization and related technological advances. In what turned out to be a significant development, the collective bargaining agreement specifically reserved to PMA alone the right to determine how to raise the Mech Fund from its members, at the rate of some $5,000,000 a year.

The complex Mech Fund formula eventually adopted by PMA was based on a variety of assessments against different types of cargo. Under the formula, Volkswagen's automobiles were being assessed at a rate 10 times higher than other cargo, even though automobiles had relatively less to gain from the PMA-ILWU agreement because the handling of automobiles already was highly mechanized. After failing to persuade PMA to adjust the formula, Volkswagen refused to pay any additional charges resulting form the PMA levy. When PMA initiated local court proceedings, Volkswagen obtained a stay in order to invoke the FMC's primary jurisdiction. Volkswagen then filed a complaint before the Commission, raising the following issues:

> 1. Whether the assessments claimed from Volkswagen were being claimed pursuant to an agreement or understanding among the PMA members that was subject to the requirements of section 15 of the 1916 Act, *i.e.*, that the

agreement should have been filed with and approved by the Commission before it was implemented by PMA;[11]

2. Whether the assessments claimed from Volkswagen resulted in subjecting its automobile cargoes to undue or unreasonable prejudice or disadvantage in violation of section 16 of the 1916 Act;[12] and

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[11] Section 15 provided in relevant part that:

> Every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy. . . of every agreement with another such carrier or other person . . . fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement.
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> • • •
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> The Commission shall . . . disapprove, cancel or modify any agreement . . . that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements . . . .
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> • • •
>
> Any agreement. . . not approved, or disapproved, by the Commission shall be unlawful, and agreements. . . shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement. . . .

46 U.S.C. § 814 (1982).

[12] Section 16 provided in relevant part:

> That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly:
>
> First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description or traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . .

46 U.S.C. § 815 (1982).

3. Whether the assessments claimed from Volkswagen constituted an unjust or unreasonable practice in violation of section 17 of the 1916 Act.[13]

In October, 1965, the Commission, by a 3-2 vote, held that the Mech Fund agreement among the PMA members did not constitute an agreement subject to section 15.[14] The primary basis for the Commission's decision was its conclusion that section 15 was meant to apply only to those agreements affecting competition among their parties; the Commission further found that section 15, so interpreted, did not apply to the Mech Fund agreement because there was no showing that the costs of the Mech Fund assessments were being passed on to shippers. The Commission also held that no violations of section 16 or 17 had been established. In December, 1966, the U.S. Court of Appeals for the District of Columbia Circuit unanimously affirmed the Commission's order in all respects.[15]

In March, 1968, the Supreme Court reversed. With respect to section 15, the Court held that the Commission's limitation of the statute's application to agreements affecting competition was not consistent with its broad language or legislative history, and that the Mech Fund agreement fit within the literal terms of section 15 and thus should have been filed with the Commission for approval before going into effect. *Volkswagen*, 390 U.S. at 273-77. It is noteworthy that the Court's majority perceived a clear distinction between, on the one hand, the Mech Fund agreement among the PMA members and, on the other hand, both the un-

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[13] Section 17 provided in relevant part that common carriers in foreign commerce

> and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property.

46 U.S.C. § 816 (1982).

[14] *Volkswagenwerk Aktiengesellschaft* v. *Marine Terminals Corporation*, 9 F.M.C. 77 (1965).

[15] *Volkswagenwerk Aktiengesellschaft* v. *FMC*, 371 F.2d 747 (D.C. Cir. 1966) (per curiam).

derlying collective bargaining agreement between PMA and the ILWU and the agreement creating PMA itself:

> It is to be emphasized that the only agreement involved in this case is the one among members of the Association allocating the impact of the Mech Fund levy. We are not concerned herewith the agreement creating the Association or with the collective bargaining agreement between the Association and ILWU. No claim has been made in this case that either of those agreements was subject to the filing requirements of § 15. Those agreements, reflecting the national labor policy of free collective bargaining by representatives of the parties' own unfettered choice, fall in an area of concern to the National Labor Relations Board and nothing we have said in this opinion is to be understood as questioning their continuing validity. But in negotiating with the ILWU, the Association insisted that its members were to have the exclusive right to determine how the Mech Fund was to be assessed, and a clause to that effect was included in the collective bargaining agreement. That assessment arrangement, affecting only relationships among Association members and their customers, is all that is before us in this case.

Id. at 278.

With respect to sections 16 and 17, although the Court did not reach the merits of those issues, it noted that if the Mech Fund agreement was subsequently filed with the Commission under section 15, the agency would be called upon again to consider the effect of sections 16 and 17, because an agreement that violated a specific provision of the 1916 Act was required to be disapproved. Accordingly, the Court felt that it was appropriate to comment upon the Commission's treatment of those issues.[18]

The Court indicated that, contrary to the Commission's holding, a violation of section 16 could be found even in the absence of a competitive relationship between the preferred individual and the prejudiced individual, particularly where ocean freight rates are not involved. 390 U.S. at 279-80. With respect to

[18] Justice Fortas did not join in this part of the Court's opinion. 390 U.S. at 295.

section 17, the Court criticized the Commission's interpretation of that statute as "far too narrow." *Id.* at 281. It noted previous Commission decisions holding that the question of reasonableness under section 17 does not depend upon discriminatory intent. The Court then stated that assessment agreements such as the Mech Fund should be judged under section 17 according to whether the charge assessed against a particular cargo is reasonably related to the services rendered to that cargo. *Id.* at 282.

Justice Douglas issued a lengthy dissent. He argued that the Court's decision would disrupt the collective bargaining process, by requiring FMC approval under section 15 of labor-related maritime agreements before such agreements could be implemented. Unlike the Court majority, he saw no practical way to separate an underlying collective bargaining agreement from a subsequent agreement among employers, such as the PMA Mech Fund, to meet their side of their bargain with their employees. 390 U.S. at 309-11. He therefore contended that both types of agreements should be exempted from section 15. It is clear that Justice Douglas's differences with the majority stemmed only from his concern with the "advance approval" requirements of section 15, and not from the prospect that the normative provisions of the 1916 Act, including sections 16 and 17, might be applied to a labor-related agreement *after* it had been implemented:

> To be sure, the parties to a collective bargaining pact must frame their agreement to fit within the standards of the antitrust laws or any other governing statutes. But without a requirement of advance approval of the terms of the agreement, they remain free to bargain speedily. Frustration of the collective bargaining process comes not so much from the possibility that one or more provisions in a collective bargaining pact might be found illegal at some future date under the antitrust laws, or other statutes such as §§ 16 and 17 of the Shipping Act, but rather from the undue and possibly lengthy freezing or stultification of solutions to troublesome labor problems while an intimate part of the proposed agreement is sent to the FMC for approval.

Id. at 312.

* * *

> If the present practice is an abuse, there is an existing remedy.... [Sections] 16 and 17 of the Shipping Act afford protection to foreign commerce in cases of undue discrimination or unreasonable practices affecting that commerce. While I cannot say that the Commission erred in finding no violation of §16, I concur in a remand to the Commission for further findings under § 17. If the finding is for petitioner, there may be an incidental and after-the-fact effect on the provisions of the collective bargaining agreement. But it will not produce the paralyzing effect which will follow when prior approval is required. The application of §§ 16 and 17 in particular instances can indeed realistically be compared with enforcement of federal antitrust laws directed against specific practices.

Id. at 313-16 (footnotes omitted).

In a separate concurring opinion, Justice Harlan took issue with both the majority and Justice Douglas. He noted that:

> Multi-employer collective bargaining must... be reconciled with the sometimes competing policies of federal laws promoting and regulating competition, *viz.*, the antitrust laws and, in the case of maritime labor relations, the Shipping Act. This is a problem on which Congress has provided relatively little direct guidance, but it is one of a kind that the Court has repeatedly grappled with.... It is a problem of line-drawing.

390 U.S. at 284. With respect to the accommodation advocated by Justice Douglas, Justice Harlan argued that the impact on collective bargaining from post-implementation attacks under sections 16 and 17 could be just as great as that caused by the section 15 pre-implementation approval process. *Id.* at 285. However, he also thought that be assuming a clear distinction between actual collective bargaining agreements and related Mech Fund-type agreements, the Court majority had failed to address some significant problems:

> The real difficulty in this case is . . . to define the Commission's jurisdiction in such a way that (whether

challenges arise before or after implementation) the Commission will not improperly be brought into labor matters where it does not belong. The Court's only suggestion is that the labor agreements involved in this case "fall in an area of concern to the National Labor Relations Board." [Citation omitted].

More circumspect analysis than this is needed, I believe. In the first place, since the later validity and antitrust immunity of all agreements subject to § 15 depend upon filing, it is desirable that signatories to agreements be given more precise instructions than that they need not file if they are in an area of Labor Board "concern." Furthermore, I see no warrant for assuming, in advance, that a maritime agreement must always fall neatly into either the Labor Board or Maritime Commission domain; a single contract might well raise issues of concern to both.

Id. at 286.

Justice Harlan suggested that collective bargaining agreements between maritime employers and their employees should have some exemption or immunity from both the filing requirements of section 15 *and* the substantive prohibitions of sections 16 and 17. He acknowledged that the PMA Mech Fund agreement was not a collective bargaining agreement and therefore was not immune or exempt from any part of the Shipping Act. Nevertheless, he maintained that FMC review of the Mech Fund agreement under the 1916 Act still "must be circumscribed by the existence of labor problems that [the Commission] is not equipped to resolve." 390 U.S. at 287.

Justice Harlan then proceeded to state his view of the correct demarcation between areas properly subject to FMC regulation and areas properly left to labor regulation. Pointing out that whenever a multi-employer bargaining unit agrees to provide benefits for employees, a question arises as to how to allocate the costs of such benefits among the various employer members of the unit and, ultimately, the employers' customers, Justice Harlan saw the proper concern of the ILWU as being that this question should "receive *some* answer, but [the union] had no proper interest in *which* of the possible cost allocation plans was

adopted, so long as any such plan raised the amount promised." *Id.* at 290 (emphasis in original). He viewed the Commission's 1916 Act obligation as that of reviewing the fairness to the employer's customers, *i.e.*, shippers, of the employer agreement allocating the cost burden of the collective bargaining agreement, and stated that this role for the Commission "does not mean Commission review of a labor agreement and does not imply consequences in conflict with national labor policy." *Id.* He cautioned, however, that:

> [N]o one has suggested that Maritime Commission review of a particular method of cost allocation may properly reach the question whether the obligation necessitating the allocation should have been entered into. . . . When the Court notes that only the assessment agreement must be filed and examined, it seems clear that it contemplates a Commission examination starting from the premise that the obligation to collect the Mech fund will be fulfilled; at issue will be only the propriety of the choice of the route to that objective.

Id. at 290-91 (footnote omitted).

Finally, Justice Harlan offered his own analysis of the sections 16 and 17 issues. With respect to section 16, he agreed with the Court majority that the analysis should not turn on whether there was a competitive relationship between the person or cargo allegedly preferred and that allegedly prejudiced:

> In the present case, the problem before PMA was the allocation of a pre-specified total cost among its various members and their customers. Since this was very much a case of first impression, the Commission would have done well to go back to the language of § 16, which proscribes any "undue or unreasonable preference or advantage to any . . . description of traffic in any respect whatsoever." Certainly, since a "modernization tax" on any one group of customers lowered, by an equivalent amount, the cost of modernization to others obligated to pay for it, an unfair allocation of the burden could properly be described as a "preference" between that "description of traffic" bearing a heavy burden

> and that "description of traffic" whose burden was correspondingly lightened.
>
> * * *
>
> The difficulty with the method of assessment adopted by PMA is that it was not uniform and general but made special provision for automobiles. The fact that all automobiles are treated alike should not have prevented the Commission from inquiring whether special treatment for this class of goods was necessary under the circumstances and, if so, whether the special rule adopted was the fairest that could be devised.

390 U.S. at 293-94. With respect to section 17, he advocated an approach quite similar to that of the Court majority (*id.* at 281-82; *see also id.* at 266, n. 8), *i.e.*, that the assessments against a particular cargo or person should be "reasonably related" to (1) the specific benefits it receives from containerization or other relevant modernization practices; and, of lesser importance, (2) the general benefits it receives from a stable labor situation brought about by the underlying collective bargaining agreement. *Id.* at 294-95.

No further law on the status of labor-related activities under the Shipping Act was made in the *Volkswagen* litigation. The related proceedings following the Supreme Court's remand broke no new ground.[17]

As discussed below, *Volkswagen's* holding with regard to pre-implementation Commission approval of labor-related agreements was eventually overtaken by legislation. Nevertheless, aspects of *Volkswagen* still have important application to this proceeding.

> 1. The six-Justice majority opinion and Justice Douglas's dissent provide no support for the proposition that the Commission must take labor considerations into account in adjudicating issues under the substantive provisions of the Shipping Act. As stated above, Justice Douglas's concern for labor policy was based only on section

[17] *See Agreement No. T-2635-2—Pacific Maritime Association Final Pay Guarantee Plan*, 18 F.M.C. 13, 19-20, 36-37 (1974), *remanded sub nom. Wolfburger Transport-Gesellschaft m.b.h.* v. *FMC*, 562 F.2d 827 (D.C. Cir. 1977).

15 of the 1916 Act and specifically not on sections 16 and 17 of that statute.

2. The majority's analysis of section 16, *i.e.*, the clear antipathy toward the notion that competitive relationships must be proved, and section 17, *i.e.*, "reasonableness" is a broad term requiring flexible interpretation, appear to be applicable now to the Rules on Containers. The majority's comments are not tied specifically to Mech Fund-type assessment agreements.

3. Justice Harlan's concurring opinion is sometimes cited for the proposition that the Commission must weigh labor factors in adjudicating issues under the Shipping Acts. However, his specific analysis of the appropriate tests under sections 16 and 17 of the 1916 Act indicate that he required above all else that the costs of a maritime labor agreement should be distributed fairly among shippers and other persons doing business with the carrier employers, and that he believed that by enforcing this fairness requirement, the Commission would not be acting "in conflict with national labor policy." 390 U.S. at 290. It must also be noted that Justice Harlan's opinion was based in significant part on certain assumptions regarding the proper limits of a union's interest in how management goes about meeting its collective bargaining undertakings. In its negotiations with the carriers regarding the Rules on Containers, particularly provisions such as the Dublin Supplement, the ILA asserted a much broader role than Justice Harlan appeared to contemplate.

4. Lastly, Justice Harlan warned that the Commission should not engage in questioning whether a collective bargaining agreement should have been entered into in the first place. As we discuss below, this concern eventually resulted in legislation aimed at removing the Commission from collective bargaining; however, some of the approaches advocated by the I.D. in this proceeding and by the parties on Exceptions to the I.D. would require the Commission to do precisely what Justice Harlan feared.

B. *The Boston Shipping Association "Labor Exemption"*

In the wake of *Volkswagen*, there was uncertainty as to the impact of the Supreme Court's decision on maritime collective bargaining agreements and on related activities and agreements among carriers and other persons. In August, 1972, the Commission issued *United Stevedoring Corporation* v. *Boston Shipping Association*, 16 F.M.C. 7 (1972) ("*BSA*"), in which the Commission announced that, in determining the extent to which it appropriately should exercise jurisdiction over such agreements and activities, the agency would apply a "labor exemption" test similar to that developed in antitrust law, by which collective bargaining agreements meeting certain requirements were immunized from antitrust attack.

The case before the Commission involved the applicability of section 15 of the 1916 Act to three agreements that presented some significant differences from the Mech Fund agreement in *Volkswagen*. One agreement was the incorporation agreement and by-laws of the Boston Shipping Association ("BSA"), an employer organization similar to PMA. There were also two agreements among the BSA members regarding the allocation of labor gangs among stevedores, one of which was incorporated in an actual collective bargaining agreement between BSA and the ILA. Thus, the separation emphasized by the *Volkswagen* majority between organic employer bargaining unit agreements and employer-employee collective bargaining agreements, on the one hand, and agreements among FMC-regulated employers on implementation of their collective bargaining obligations on the other hand, had been breached, as Justice Douglas had predicted in his dissent. Nevertheless, without extensive discussion, the Commission held that the BSA organic agreement fell within section 15. With respect to the stevedore allocation agreement set forth in the collective bargaining agreement, the FMC further held that incorporation into a collective bargaining agreement did not provide a basis for removing an agreement otherwise covered by section 15 from the statute. 16 F.M.C. at 13-15.

The NLRB had participated in the proceeding before the Commission and had helped develop suggested guidelines re-

garding the creation of a "labor exemption"for 1916 Act agreements. The Commission discussed the three leading Supreme Court decisions involving the accommodation of labor antitrust policies.[18] Those cases essentially involved collective bargaining provisions that cast doubt on the legitimacy of the underlying bargaining process because they affected competition between the employers who were parties to the collective bargaining agreement, and other companies.

The Commission stated:

> [F]rom these cases have evolved the various criteria for determining the labor exemption from the antitrust laws and which we herewith adopt for purposes of assisting us in determining the labor exemption from the shipping laws with this caveat. These criteria are by no means meant to be exclusive nor are they determinative in each and every case. Just as in the accommodation of the labor laws and the antitrust laws the courts have resolved each case on an ad hoc basis, so too will we. Each of the following criteria deserves consideration, but it is obvious that each element is not in and of itself controlling. They are rather guidelines or "rules of thumb" for each factual situation. These criteria are as follows:
>
> 1. The collective bargaining which gives rise to the activity in question must be in good faith. Other expressions used to characterize this element are "arms-length" or "eyeball to eyeball."
>
> 2. The matter is a mandatory subject of bargaining, *e.g.* wages, hours or working conditions. The matter must be a proper subject of union concern, *i.e.*, it is intimately related or primarily and commonly associated with a bona fide labor purpose.

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[18] *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO* v. *Jewel Tea Co., Inc.*, 381 U.S. 676 (1965); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965); *Allen Bradley Company* v. *Local Union No. 3, International Brotherhood of Electrical Workers*, 325 U.S. 797 (1945).

3. The result of the collective bargaining does not impose terms on entities outside of the collective bargaining agreement.

4. The union is not acting at the behest of or in combination with nonlabor groups, *i.e.*, there is no conspiracy with management.

16 F.M.C. at 12-13. The Commission then added:

> In the final analysis, the nature of the activity must be scrutinized to determine whether it is the type of activity which attempts to affect competition under the antitrust laws or the Shipping Act. The impact upon business which this activity has must then be examined to determine the extent of its possible effect upon competition, and whether any such effect is a direct and probable result of the activity or only remote. Ultimately, the relief requested or the sanction imposed by law must then be weighed against its effect upon the collective bargaining agreement.

16 F.M.C. at 13. By adopting an approach that focused on whether a particular agreement affected competition, the Commission reverted to a modified version of its position in *Volkswagen*: the greater the effect of a labor-related maritime agreement on competition, the less likely it became that the agreement appropriately could be granted a "labor exemption" from the pre-implementation approval process of section 15.

The Commission also stated that maritime collective bargaining agreements themselves should be given special consideration both for section 15 approval and for adjudications under sections 16 and 17:

> Since maritime employers are permitted to bargain as a group, and since they are required to bargain about certain subjects (the mandatory subjects of collective bargaining), the resulting agreements must have some exemption from the requirements of section 15. Further, each such agreement will be entitled to labor policy considerations on an ad hoc basis with respect to possible violations of sections 16 and 17 of the Shipping Act.

16 F.M.C. at 13.

Applying the "labor exemption" guidelines to the agreements before it, the Commission held that all three agreements should be granted an exemption from section 15. As to the articles of incorporation and the bylaws of BSA itself, the Commission held that no valid regulatory purpose would be served in requiring organic agreements of collective bargaining units to be filed, unless they provided for purposes other than collective bargaining. The Commission further found that the second agreement, assigning labor gangs to stevedores, involved only the hiring by employers of employees and should be exempt from section 15 jurisdiction because of the strong labor policy considerations present and the remote and minimal effects upon competition.

The third agreement under consideration was incorporated in the BSA-ILA collective bargaining agreement. It involved the rights of a stevedore to whom a labor gang was assigned to have "first call" rights to that gang, and to "recall" that gang from another stevedore even though the gang may not have completed work on the vessels from which it was recalled. The Commission found that although this agreement went beyond the mere hiring of employees and did, in fact, have some competitive effects and overtones, it nonetheless was the product of *bona fide* arm's-length collective bargaining. The Commission also found that the subject matter of the agreement was apparently a mandatory subject of collective bargaining and no terms were imposed on entities outside the collective bargaining group. For these reasons, the Commission determined that this agreement also was entitled to a labor exemption from the filing and approval requirements of section 15.

The Commission also held that the record did not support the allegations of complainant United Stevedoring Corporation that BSA's practices regarding the allocation of labor gangs to stevedores, as reflected in the agreements under examination, had violated sections 16 or 17 of the 1916 Act. The Commission's brief discussion of these issues centered on United Stevedoring's failure to prove that it had been harmed competitively by BSA's practices, and contained no acknowledgment of or effort to dis-

tinguish the Supreme Court's statement in *Volkswagen* that section 16 does not necessarily require such a showing where ocean freight rates are not involved. 16 F.M.C. at 15-16. Although the Commission commented in passing that any prejudice suffered by United Stevedoring may have been justified by its refusal to meet certain conditions imposed by the collective bargaining agreement on the assignment of work gangs, *id.* at 16; *see also id.* at 22-26, the Commission did not weigh "labor considerations" in reaching its conclusions with respect to sections 16 and 17.

The Commission's holding that section 15's requirements applied to articles of incorporation of collective bargaining units made up of Shipping Act-regulated employers and to collective bargaining agreements themselves (or at least parts thereof) went beyond the literal confines of *Volkswagen*, but was consistent with the majority Court opinion. However, by adopting "labor exemption" criteria that called for, among other things, determinations of whether the collective bargaining had been in good faith and whether the matters bargained for were of proper concern to the union, the Commission placed itself squarely in a position that none of the opinions in *Volkswagen* appeared to contemplate, *i.e.*, of making findings of fact and conclusions of law regarding the collective bargaining process itself. Criteria aside, the "labor exemption" was limited to exempting agreements from the filing requirements of section 15 of the 1916 Act; the Commission did not indicate that it contemplated using a similar rule to exempt agreements—and activities by individual carriers—from regulation under the entire 1916 Act, including sections 16 and 17.

C. *The New York Shipping Association Decisions*

One year after the *BSA* decision, the Commission applied its labor exemption test to *deny* an exemption for a Mech Fund-type assessment agreement between the New York Shipping Association (NYSA) and the ILA. *New York Shipping Association—NYSA—ILA Man-Hour/Tonnage Method of Assessment*, 16 F.M.C. 381 (1973), *aff'd sub nom. New York Shipping Association, Inc.* v. *FMC*, 495 F.2d 1215 (2d Cir.), *cert. denied*, 419 U.S. 964 (1974).

Unlike *Volkswagen*, the union was a party to this assessment agreement, the ILA having agreed with NYSA that the assess-

ment issue would be included in the collective bargaining process, with full ILA participation. The Commission had ordered NYSA and the ILA to show cause why their assessment formula, as set forth in a 1972 amendment to their collective bargaining agreement, was not subject to section 15 of the 1916 Act, and not in violation of sections 16 and 17 as well.

In discussing the applicability of section 15 to the assessment agreement, the Commission, in a shift of tone from its *BSA* decision, acknowledged the significance of the fact that the agreement was part of a collective bargaining agreement. Nevertheless, the Commission held that the assessment agreement was not entitled to an automatic labor exemption from the approval requirements of section 15. The Commission then applied its *BSA* labor exemption criteria and found that "[w]hat the ILA wants here is not some new agreement on fringe benefits as such, but a guarantee that fringe benefits already negotiated will in fact be timely paid." 16 F.M.C. at 392. Thus the ILA had asserted in this agreement a much broader interest than that described by Justice Harlan in *Volkswagen* as one appropriate for union concern. After analyzing federal labor statutes and court decisions, the Commission held that the assessment formula did not result from negotiations concerning a mandatory subject of collective bargaining (the second *BSA* criterion). The Commission also found that the agreement did impose its terms on persons outside of the collective bargaining group (the third *BSA* criterion), because non-member carriers were required, as a condition precedent to receiving terminal services at the Port of New York, to sign an agreement levying assessments in accordance with the assessment formula.

Having made these findings, the Commission stated that it was unnecessary to determine whether the collective bargaining between NYSA and the ILA had been in good faith or whether the ILA had conspired with NYSA (the first and fourth *BSA* criteria). The FMC concluded that the assessment formula agreement should not be granted a labor exemption, and instituted a proceeding to determine whether the agreement should be approved pursuant to section 15. For the duration of the proceeding, the Commission granted interim approval to the assessment

agreement, pending any adjustments that might be necessary at the conclusion of the investigation. 16 F.M.C. at 396.

The Commission declined to make any findings with regard to sections 16 and 17, and stated that the status of the NYSA-ILA assessment agreement under those statutes would be included in the new proceeding. As in *BSA*, the Commission gave no indication that a labor exemption from section 16 or section 17 could be granted to the agreement. [19]

In April, 1974, the U.S. Court of Appeals for the Second Circuit affirmed the Commission's order.[20] The court attached no importance to the fact that, unlike *Volkswagen*, the ILA was a party to the assessment agreement:

> To be sure, the FMC has no concern with so much of the agreement as provides what wages and other benefits shall be paid to the longshoremen, grievance procedures and similar matters. But even though we fully accept that the ILA has an important stake in the existence of a workable and reliable assessment formula, this does not relieve the FMC of its duty to determine whether the formula is reason-

[19] In a separate opinion, Commissioner Clarence Morse stated:

> I concur in the majority's conclusion that the lawfulness of the assessment formula under sections 16 and 17 of the Shipping Act, 1916, must be tested under a fresh record establishing the conditions and circumstances as applicable thereto. It is implicit in such a conclusion that the assessment formula is not a mandatory subject of labor-management bargaining, that labor-exempt status therefore does not automatically apply, and that whether we will or will not grant a labor exemption to the assessment formula turns on a resolution of a line-drawing problem as between the Shipping Act, 1916, and the National Labor Relations Act, which can be accomplished only after full exposure to the applicable facts.

16 F.M.C. at 398 (footnote omitted). Commissioner Morse apparently believed that the *BSA* "final analysis" would be performed only if a Shipping Act case under sections 16 and 17 had been made out against the assessment agreement, and that the "final analysis" then would determine whether labor considerations outweighed Shipping Act considerations. However, the Commission majority had already performed a "final analysis" as part of its conclusion that a labor exemption should not apply. 16 F.M.C. at 395. Thus the majority utilized labor considerations only to determine the question of section 15 jurisdiction, and not to the undecided issues of possible substantive violations of the 1916 Act.

[20] The Commission was supported before the court by the Department of Justice, and opposed by the Department of Labor and the NLRB. However, the court made no mention of the latter agencies' position in its discussion of the merits.

> able in its effects on shipping. That inquiry is just as important as under the . . . agreement in *Volkswagenwerk*. Similarly, the fact that the union has here succeeded in forcing NYSA to bargain over the assessment formula does not by itself take the formula out of the reach of § 15. The union's achievement demonstrates its power to force this concession, but it does not dilute the magnitude of problems raised by the formula for shippers and carriers.

495 F.2d at 1220-21.

The court did not approve or disapprove the Commission's four specific labor exemption criteria. Instead, the court concluded that the assessment agreement would have a direct and substantial effect on competition among both carriers and shippers and for that reason raised Shipping Act problems that "clearly predominate over the labor interests raised by the assessment formula." 495 F.2d at 1221.

In *dicta*, the court also indicated its belief that the Commission should continue to weigh labor interests in its investigation of the sections 16 and 17 issues:

> Plainly, the labor interests in the agreement do not evaporate upon a finding of FMC jurisdiction; those interests demand the Commission's continuing attention throughout the process of investigating the status of the agreement under §§ 16 and 17. In determining whether to approve the agreement, the Commission must be particularly sensitive to aspects of the assessment scheme that have relatively more impact on the collective bargaining process and relatively less on competitive conditions in the industry. As the petitioners have repeatedly pointed out, the ILA's interest is primarily in assuring that the fringe benefit payments will be made; it has no proper concern over who makes the payments as long as they are forthcoming. The portion of the assessment formula allocating payment requirements, therefore, is farthest from the union's legitimate sphere of interest. The more vital portions of the agreement, so far as the union is concerned, are the provisions relating to the means by which the assessment obligations are to be collected. Correspondingly, the allocation formula would seem to be of primary

> concern to the FMC, while the enforcement mechanism would appear to have substantially less potential effect on competitive conditions. In determining whether the agreement should be approved, disapproved or modified, the Commission must thus continue to weigh the Shipping Act and labor interests raised by different portions of the agreement and should move with caution in areas of greater collective bargaining concern.

495 F.2d at 1222 (footnote omitted).

By emphasizing competition as a tool for accommodating labor interests under sections 16 and 17, the Court of Appeals appeared to depart from *Volkswagen*. Neither the majority nor the separate opinions in *Volkswagen* held that labor assessment formulas should be reviewed under the substantive provisions of the 1916 Act by determining whether they created competitive disadvantages for particular classes of carriers or shippers; on the contrary, both the majority and Justice Harlan indicated that an unjust preference or prejudice in violation of section 16 by an assessment agreement could be established without a showing that competitive relationships among shippers had been affected. Section 17 has never been interpreted by the Commission as requiring evidence of an impact on competition, and the Supreme Court's endorsement of a flexible standard under that statute did not impose such a showing. Thus, the suggestion by the Court of Appeals that, in an adjudication under section 16 or section 17, the Commission should view Shipping Act interests as being coextensive with impact on competition and that the Commission should allow labor interests to predominate if the conduct in question does not affect "competitive conditions in the industry," 395 F.2d at 1222, gave the agency a different set of interpretive standards than those articulated six years earlier in *Volkswagen*.

There were no further substantive developments in the law in this case; the Commission investigation was eventually settled and discontinued without a subsequent decision on the merits.[21]

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[21] Docket No. 73-34—*New York Shipping Association—Man-Hour/Tonnage Assessment Formula.*

D. *The PMA Litigation*

In January, 1975, the Commission again denied a labor exemption to an agreement that was part of a collective bargaining contract. The collective bargaining parties here were PMA and the ILWU, the same parties as in *Volkswagen*. *Pacific Maritime Association—Cooperative Working Arrangements*, 18 F.M.C. 196 (1975), *rev'd sub nom. Pacific Maritime Association* v. *FMC*, 543 F.2d 395 (D.C. Cir. 1976), *rev'd*, 435 U.S. 40 (1978).

The agreement in issue was meant to correct difficulties resulting from differences in fringe benefit plans and certain labor practices between the PMA-ILWU collective bargaining agreement and the ILWU's agreements with ports not members of PMA. PMA and ILWU agreed that nonmember ports, as a condition of using the PMA-ILWU dispatching halls for jointly registered employees, would be required, among other things, to participate in all fringe benefit plans, pay the same dues and assessments as PMA members and be treated as a PMA member during strikes and work stoppages. At the request of several small nonmember ports, the Commission had begun an investigation in September, 1972, to determine whether this PMA-ILWU agreement was subject to section 15 of the 1916 Act and whether its implementation would result in practices violative of sections 16 and 17.

In the original order of investigation, the Commission included as an issue whether there were any labor policy considerations that should exempt the agreements and practices under investigation from any of the relevant sections of the 1916 Act, *including* sections 16 and 17. *See* 18 F.M.C. at 197. This was the first occasion on which the Commission indicated (albeit without comment or explanation) that the labor exemption criteria could apply to the substantive prohibitions of the 1916 Act, as well as to section 15. The *BSA* decision, issued one month earlier in August, 1972, had applied the labor exemption guidelines only to section 15. Nor did the Commission subsequently apply the approach ordered here in other cases. In June, 1973, less than a year later, the Commission issued *NYSA*, which, in denying a labor exemption for section 15 purposes and ordering a further investigation under sections 16 and 17, gave no indication that the

investigation should determine whether a labor exemption should be granted for sections 16 or 17.

The Commission had severed, for expeditious resolution, the issue of its section 15 jurisdiction over the PMA-ILWU agreement. The Commission found without difficulty that because the purpose of the agreement was to control competition between PMA ports and nonmember ports, the agreement was subject to section 15 unless it was entitled to a labor exemption.

In applying the four *BSA* labor exemption criteria, the Commission determined that the agreement was not concerned with mandatory subjects of collective bargaining as defined by the National Labor Relations Act and cases thereunder (the second *BSA* criterion), because the agreement had as its primary purpose the inclusion of nonmember ports into the PMA "camp," and any effect on ILWU wages or working conditions would be incidental. 18 F.M.C. at 203-204. The Commission then reviewed several provisions of the agreement and found that it did impose its terms on entities outside the collective bargaining group (the third *BSA* criterion), because the agreement's overall effect was to require nonmember ports either to submit to its terms or to incur sanctions such as denial of participation in PMA hiring halls and fringe benefit funds, as well as use of ILWU labor. *Id.* at 206. In view of these findings, the Commission, as it did in *NYSA*, found it unnecessary to determine whether the PMA-ILWU bargaining had been in good faith or whether the ILWU had conspired with PMA (the first and fourth *BSA* criteria). *Id.* at 203, 208.

The Commission then performed its *BSA* "final analysis" and found that while the agreement had a potentially severe and adverse effect upon competition among ports, its importance to the collective bargaining process was minimal because "[w]ith or without the [agreement], the provisions for fringe benefits, which are the main concern of the ILWU, remain unchanged." 18 F.M.C. at 209. The Commission thus concluded that a labor exemption should be denied and issued an order directing an investigation of the agreement to determine whether it should be approved under the standards of section 15. Unlike *NYSA*, however, the Commission did not grant interim approval to the agree-

ment. The Commission also directed that the investigation should determine whether implementation of the agreement would result in practices violative of sections 16 or 17, and whether "any labor policy considerations would operate to exempt these agreements or practices resulting therefrom from any provision of sections 16 or 17 . . . ." *Id.* at 212-13.[22]

THE COURT OF APPEALS

In August, 1976, the U.S. Court of Appeals for the District of Columbia Circuit reversed the Commission's decision. The court held that labor-related agreements among Shipping Act-regulated employers (such as the *Volkswagen* Mech Fund) should be the outermost boundary of section 15 jurisdiction, and that underlying collective bargaining agreements negotiated between such employers and labor should, as a class, fall outside that jurisdiction. Thus the D.C. Circuit reached a contrary conclusion from that of the Second Circuit two years earlier in *NYSA*, which held that Commission jurisdiction over a labor-management agreement (at least one not qualified for a labor exemption) was a natural extension of *Volkswagen*.

Although the court said that it appreciated the difficulties the Commission faced in reconciling competing statutes and national policies, it held that the Commission's solution of applying the *BSA* labor exemption derived from antitrust law to collective bargaining agreements was not satisfactory, at least as far as sec-

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[22] As he did in NYSA, Commissioner Clarence Morse dissented. Showing increasing uneasiness with the Commission's assertion of section 15 jurisdiction over labor-related agreements, Commissioner Morse would have granted a labor exemption here for section 15 purposes, because he believed that the impact of the agreement on the collective bargaining process outweighed any effect it might have on port competition. He stated:

> In my opinion, the majority ignore the reality of labor-management relations when they suggest that denial of labor exemption to the Revised Agreement "will have no effect upon PMA's obligations under the labor contract." This is another indication of our lack of expertise in this labor-management field.

18 F.M.C. at 210, n. 21. Nevertheless, Commissioner Morse did state that sections 16 and 17 could apply to practices resulting from the agreement.

tion 15 was concerned, because of that statute's requirement of pre-implementation approval:

> Unlike the antitrust laws, section 15 prescribes a procedure whereby agreements subject to the Act must be filed with the Commission *before implementation*. The legislative scheme is a sound one for assuring that agreements among carriers which fix rates, pool earnings, allocate ports, or limit traffic must be approved or modified by the agency with an expertise in shipping matters. As the legislatively established regulator of maritime concerns, the Commission needs authority to postpone the effective date of such agreements pending full examination of their impact on the entire industry. The Federal Maritime Commission, however, is not in any way the congressional choice of regulator for labor relations within the shipping industry .... Subjecting negotiated labor agreements to filing and approval (or disapproval or modification) would place collective bargaining units in the shipping industry under more stringent federal regulation than other transportation industries and thus at a competitive disadvantage.

543 F.2d at 406 (emphasis in original). The court pointed out that collective bargaining required the ability of both sides to implement quickly compromise agreements worked out in eleventh-hour bargaining sessions or, as in this case, in hard-fought negotiations following a strike and mediation. The court noted that the agreement in question was illustrative of the problem because it had been negotiated in 1972 and refined in 1973, but had not yet been put into effect. The ameliorant of interim approval, granted by the Commission in *NYSA* but not granted here, was viewed as inadequate by the court. *Id.* at 407.

The court revived the distinction noted by the *Volkswagen* majority between agreements among Shipping Act-regulated employers related to underlying employer-employee collective bargaining agreements, and the collective bargaining agreements themselves. This distinction had been essentially ignored by the Commission in *BSA*, and then acknowledged but held to be not determinative in *NYSA*. The D.C. Circuit here used that distinction to create a judicial barrier, which it acknowledged could be

described as arbitrary, 543 F.2d at 409, against FMC jurisdiction over employer-employee agreements. With regard to Justice Harlan's concurring opinion in *Volkswagen*, which had provided the foundation for the *BSA* and *NYSA* results, the court stated:

> Even if we were to adopt the balancing test suggested by Justice Harlan, the agreement at issue would be exempt from filing. The agreement challenged in *Volkswagenwerk* assessed fees to employers on the basis of tonnage handled, tonnage being determined by weight or measurement depending upon the manifesting custom for each type of cargo. Almost all the employers passed these costs on to their customers, thus causing the assessment to fall disproportionately on shippers who transported automobiles by nonmember charter and common carriers. In this way, *the agreement produced discriminatory tariffs—a primary concern of the Act*—for the shipping of automobiles.
>
> In contrast, [this agreement] is challenged not because it will compel discriminatory rates, but because it will allegedly force nonmembers into accepting the same wage, fringe benefit and work stoppage terms as those negotiated by the multiemployer unit.... FMC has thus accepted jurisdiction to determine shipping implications of an agreement which perhaps imposes an improper bargaining unit. We do not believe that the Shipping Act pre-implementation approval provision was intended to cover problems so clearly within the realm of National Labor Relations Board expertise.

Id. at 409-10 (emphasis supplied) (footnotes omitted).

At the close of its opinion, the court cautioned that in holding that the Commission did not have section 15 jurisdiction over these agreements, it was not insulating the agreements from FMC scrutiny under the rest of the 1916 Act:

> Despite the inappropriateness of section 15 procedures for collective bargaining agreements, shipping concerns are clearly evident in the possibility that the *actual implementation* of the agreement will result in discriminatory practices or rates against the complaining ports. The concept of section 15 jurisdictional prerequisites different from those of

> sections 16 and 17 is not novel. The Act itself provides for FMC consideration of individually-imposed discriminatory rates and practices as well as approval of inter-carrier agreements.

543 F.2d at 410 (emphasis in original). Like the Second Circuit's decision in *NYSA*, the court then stated that labor considerations should continue to apply to Commission examination of allegedly discriminatory or unreasonable practices. However, unlike the Second Circuit's suggestion that the Commission should weigh labor and shipping concerns based on relative impact on competition, the D.C. Circuit thought that this was an appropriate area for application of the *BSA* labor exemption:

> FMC jurisdiction under sections 16 and 17 must still accommodate labor concerns and the exemption borrowed from antitrust law would appear to be the proper limit on that jurisdiction. Unlike the prior approval strictures of section 15, sections 16 and 17 impose penalties after-the-fact and do not interrupt industrial peace by forbidding or postponing implementation of collective bargaining terms. Like the antitrust laws, they protect the shipping industry from predatory rates and practices and are thus suitable tools for controlling Shipping Act violations which result from labor-management conspiracies.

Id. at 411. As noted, in its order directing a continued investigation of the agreements, the Commission also had raised an issue whether a labor exemption should be applied to the sections 16 and 17 issues.

THE SUPREME COURT

In March, 1978, the Supreme Court, by a 5-3 vote,[23] reversed the D.C. Circuit and reinstated the result reached by the Commission. The Court stated that it had granted the petition for certiorari filed by the Commission and the Department of Justice in order to resolve two issues: whether national labor policy required exempting all collective bargaining agreements as a class from the filing requirements of section 15 (which had been the

[23] Justice Blackmun did not participate.

conclusion of the D.C. Circuit) and, if not, whether the PMA-ILWU agreement nevertheless should be exempt from those requirements.

The Court first stated that it could not agree with the D.C. Circuit that, whatever their effects on competition might be, collective bargaining contracts were categorically exempt from section 15. The Court agreed that prompt implementation of "lawful" collective bargaining agreements is an important consideration, 435 U.S. at 57, but it stated that the D.C. Circuit's fears about the impact of section 15 on such implementation were exaggerated because (1) agreements between a union and a single employer would not be subject to section 15 filing; and (2) only those agreements between a union and multiemployer bargaining units that operated to the detriment of commerce or otherwise failed to meet the standards of section 15 could be disapproved by the Commission, and this would exclude most ordinary collective bargaining agreements. The Court also noted the availability of conditional approvals by the Commission, and rejected the D.C. Circuit's argument that conditional approval was an inadequate solution.

Regarding the Commission's refusal to grant a *BSA* labor exemption to the PMA-ILWU agreement, the Court stated that "the Commission found all it needed to find to assume jurisdiction and proceed with the case under section 15 when it concluded that PMA and the Union had undertaken to impose employment terms and conditions on employers outside the bargaining unit." 435 U.S. at 62. The Court otherwise endorsed the Commission's construction and employment of the *BSA* labor exemption, and rejected suggestions that the Commission lacked the experience or ability to deal with labor-related agreements.

The majority opinion made no mention of the applicability of sections 16 and 17 to the PMA-ILWU agreement. However, Justice Powell, writing for the three dissenters, stated;

> A proper accommodation of the conflicting signals of the Shipping Act and federal labor policy requires that bona fide collective-bargaining agreements, arrived at through arms-length negotiations, do not fall within section 15. As in other collective bargaining contexts, labor and management

> in the maritime industry would be free to reach agreement without prior Government approval or control over the substantive terms of the bargain, while the agreement itself or its implementation would be subject to scrutiny under the antitrust laws and the specific prohibitions of §§ 16 and 17 of the Act.

435 U.S. at 68 (footnotes omitted). *See also id.* at 77. Thus, Justice Powell's dissent essentially tracks the argument first made by Justice Douglas ten years earlier in his dissent in *Volkswagen*: that the national policy in favor of unfettered collective bargaining should remove maritime collective bargaining agreements (and, presumably, related Mech Fund-type agreements) from section 15's requirement that such agreements must be approved before they can be implemented, and that the shipping public can be protected adequately by the application of the substantive prohibitions of the 1916 Act against discriminatory and unreasonable practices to such agreements once they have gone into effect.

The Supreme Court's decision reinstated the Commission's order instituting an investigation to determine whether the PMA-ILWU agreement should be approved under section 15, and had no effect on the Commission's additional directive that the investigation also should determine whether implementation of the agreement would violate sections 16 and 17 and whether "labor policy considerations" should "exempt" the agreements from those sections. Three weeks after the Supreme Court's decision, PMA and the ILWU withdrew from their agreement, thus removing the necessity for any further Commission proceedings.[24] Nevertheless, some comment on the references by the Commission and the D.C. Circuit Court of Appeals to the application of labor considerations is appropriate.

There is no apparent explanation for the Commission's reference in the original order of investigation in September, 1972, to a possible labor exemption from sections 16 and 17. As noted, that reference had no antecedent in the month-old *BSA* decision

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[24] Docket No. 72-48, *Pacific Maritime Association-Cooperative Working Arrangements*, Order Dismissing Application and Discontinuing Proceeding, 18 S.R.R. 523 (ALJ), administratively final June 22, 1978.

and was not repeated the following year in *NYSA*. The renewal of that issue in the January 1975 order structuring further proceedings on the PMA-ILWU agreement is even more perplexing, because by that time the Commission had already determined that a *BSA* labor exemption should not be granted to that agreement for purposes of section 15. Since the Second Circuit's decision in *NYSA* had been issued the previous year, it is possible that the 1975 order's reference to an exemption meant instead to direct that evidence as to "labor policy considerations" should be developed and weighed in any adjudication under section 16 or section 17, as the Second Circuit had suggested.

In any event, there is a fundamental difference between the approach espoused by the Second Circuit in *NYSA* and that apparently visualized by the D.C. Circuit two years later in *PMA*. As noted, the Second Circuit had suggested that labor interests should continue to be relevant throughout a Commission investigation under sections 16 and 17. In contrast, the D.C. Circuit would have had the Commission apply labor considerations in a *BSA* exercise in order to determine threshold jurisdiction under sections 16 and 17, but the court did not cite *NYSA* or otherwise indicate that the Commission should continue to weigh labor concerns *after* jurisdiction had been asserted. The discussions by both courts on this point are technically *dicta*, but it would have been irresponsible for the Commission, as a subordinate agency, to ignore advisory interpretations by a circuit court. Nevertheless, it is clear that, at this point in time, the issue of the place of "labor considerations" in Shipping Act adjudications remained confused and unsettled. Certainly, the Commission had not articulated a coherent and consistent approach of its own.

E. *The Commission's 1978 "Sea-Land" Decision on the Rules on Containers*

On June 14, 1978, three months after the Supreme Court's decision in *PMA*, the Commission issued its decision concerning the application of the Rules on Containers to the domestic offshore trade between the U.S. East and Gulf Coasts and Puerto Rico. *Sea-Land Service, Inc. and Gulf Puerto Rico Lines, Inc.—Proposed Rules on Containers*, 21 F.M.C. 1 (1978) ("*Sea-Land*"), *aff'd in part and remanded in part sub nom. Council of*

North Atlantic Shipping Associations v. *FMC*, 672 F.2d 171 (D.C. Cir.), *cert. denied*, 459 U.S. 830 (1982), report and order on remand, FMC Nos. 73-17 and 74-40, 21 Pike & Fischer Shipping Regulation Reports (S.R.R.) 852 (May 19, 1982), *vacated and remanded*, unofficially reported at 21 S.R.R. 1057 (D.C. Cir. July 2, 1982), *reh. en banc denied*, No. 78-1776 (D.C. Cir. Sept. 23, 1982). As the foregoing citation indicates, this proceeding had a long and tangled history. We shall summarize the Commission's decision here. However, in the belief that close adherence to chronology is the most helpful method of discussion, we have postponed discussion of the subsequent appellate proceedings to subpart I, *infra*, after analysis of two important intervening events, the Supreme Court's decision in *NLRB* v. *International Longshoremen's Association*, 447 U.S. 490 (1980), and the passage into law of the Maritime Labor Agreements Act, and a summary of the institution of this proceeding.

On March 15, 1973, two ocean common carriers, Sea-Land Service, Inc. ("Sea-Land"), and Gulf Puerto Rico Lines, Inc. ("GPRL"), filed proposed amendments to their tariffs applicable between East and Gulf Coast ports and Puerto Rico, which set forth the Rules on Containers in the form required by the collective bargaining agreements then in effect between the carriers and the ILA (the "Dublin Supplement" had just been negotiated). As previously noted, the Puerto Rican trade was the first in which the container method of ocean transportation was used extensively, and the consolidation of less-than-containerload shipments into containerloads was prominent in this trade. These two factors apparently prompted the ILA to focus its efforts in the early 1970's to enforce the Rules on the Puerto Rican trade.

The tariff amendments filed by Sea-Land and GPRL were scheduled to become effective on April 14, 1973. However, on April 13, the Commission, acting pursuant to its authority under the Intercoastal Act, 46 U.S.C. § 843 *et seq.* (1982), suspended the tariffs through August 13, 1973, and instituted an investigation (Docket No. 73-17, *Sea-Land Service, Inc. and Gulf Puerto Rico Lines, Inc.—Proposed Rules on Containers)* to determine whether implementation of the Rules as set forth in the tariffs would vio-

late sections 14 Fourth, 16 First or 18(a) of the 1916 Act, or section 4 of the Intercoastal Act.[25]

During the period between April, 1973, and August, 1974, Sea-Land and GPRL withdrew from the Puerto Rican trades and were replaced by the Puerto Rico Maritime Shipping Authority ("PRMSA"). On August 2, 1974, PRMSA filed with the Commission a tariff scheduled to be effective on September 16, 1984, when PRMSA planned to commence operations as a common carrier in the Puerto Rican trades. Portions of that tariff set forth Rules on Containers provisions identical to those already under investigation. On September 13, the Commission placed PRMSA's proposed tariff under investigation (Docket No. 74-40, *Puerto Rico Maritime Shipping Authority—Proposed ILA Rules on Containers*) and consolidated the new investigation with Docket No. 73-17. The Commission also suspended PRMSA's tariff until January 15, 1975. This suspension subsequently was vacated by the Commission on September 23, 1974, but actual implementation of PRMSA's Rules on Containers tariff at ports along the East Coast was sporadic and inconsistent, in part because of injunctions obtained by the NLRB.

The Commission's 1978 decision adopted in all important aspects an initial decision issued on October 9, 1975, by an administrative law judge ("ALJ").[26] The ALJ rejected the conten-

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[25] Section 14 Fourth of the 1916 Act forbade ocean common carriers from unfairly treating or unjustly discriminating against any shipper "in the matter of . . . cargo space accommodations or other facilities . . . ." 46 U.S.C. § 812 (1982). Section 18(a) of the 1916 Act and section 4 of the Intercoastal Act required ocean carriers in the domestic offshore trades to establish ad observe just and reasonable tariffs and practices. 46 U.S.C. § § 817 (a), 845a (1982). *See* n. 12, *supra*, regarding section 16 First of the 1916 Act.

[26] The delay between the initial decision and the Commission's decision was caused by intervening litigation against the Rules on Containers under the federal labor laws. In 1975, the NLRB held that the Rules violated the National Labor Relations Act and ordered that implementation of the rules in the Port of New York must cease. The NLRB's decision was upheld on appeal. *International Longshoremen's Association (Consolidated Express, Inc.)*, 221 N.L.R.B. 956 (1975), *enforced sub nom. International Longshoremen's Association v. NLRB*, 537 F.2d 706 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977), *vacated and remanded*, No. 75-4266 (2d Cir. Oct. 1, 1980). After the NLRB decision,

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tion advanced by CONASA[27] that the Commission lacked jurisdiction over the Rules as reflected in PRMSA's tariff because of their origin in a collective bargaining agreement. He stated that it is a "fundamental truth" that "the FMC has jurisdiction over tariffs (rules, rates, etc.) of ocean common carriers in the United States mainland/Puerto Rico trade." 21 F.M.C. at 29. He further found that PRMSA's tariffs should not be granted a *BSA* labor exemption from application of the 1916 Act and the Intercoastal Act. However, the ALJ did not make any findings under the *BSA* criteria, but instead held simply that the tariffs constituted

> a shipping matter subject to shipping laws, and separate from any labor matter and the labor laws. However, if one were to conclude that PRMSA's rules on containers are partly a shipping matter and partly a labor matter, one still must conclude that the shipping part is of such importance that it is not immunized from the shipping laws.

Id. at 33.

The ALJ also found that the rules violated the common carrier obligations imposed upon PRMSA by the 1916 Act and the Intercoastal Act. The ALJ relied both on the facially discriminatory provisions of the Rules themselves and on evidence of actual effects of the Rules on specific business enterprises. Testimony as to the Rules' effects was largely limited to the Port of New

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PRMSA had filed a tariff note indicating that its Rules on Containers provisions would not be enforced pending review of the NLRB's decision. In light of this tariff note and the subsequent court decision upholding the NLRB, the Commission discontinued Dockets Nos. 73-17 and 74-40 on August 10, 1977. 20 F.M.C. 120. However, various persons opposed to the Rules filed petitions asking the Commission to reconsider its action. On the basis of these petitions, the Commission vacated its order of discontinuance and determined to issue a decision on the merits of the proceeding. 20 F.M.C. 788; 21 F.M.C. at 2-3.

[27] CONASA was formed in 1971 and acted as a multiemployer bargaining representative in negotiating master contracts with the ILA for East Coast ports, including New York and Baltimore. In 1977, NYSA withdrew from CONASA and subsequently has represented itself in negotiations with the ILA. The Boston Shipping Association also withdrew from CONASA in 1982. During the proceedings before the ALJ, CONASA, rather than PRMSA, took the lead in defending the Rules. The ILA was not a party to the proceedings.

York; as noted above, actual implementation of PRMSA's tariff along the East and Gulf Coast was erratic and inconsistent. 21 F.M.C. at 16. The ALJ discussed this evidence, *id.* at 24-25, but he focused more on types of discriminations imposed by the text of the Rules. For example, he noted that an export shipper within the 50-mile zone who loaded a full container at its own facility obtained more favorable treatment than either a shipper whose full container was loaded at a public warehouse or a shipper whose goods formed part of a consolidated containerload. Imported containers whose destinations were within the 50-mile zone were subject to ILA stripping, or 30 days warehouse storage, unless the owner unloaded the goods at its own warehouse facilities. None of these differences, the ALJ found, were justified by any difference in the value of the transportation services provided by PRMSA, which in each case simply transported a sealed container aboard its vessel. *Id.* at 25-28. Apart from the broad discriminations among categories of shippers, the ALJ found that the Rules impose additional delays and expense upon shippers, that some of the Rules' provisions were ambiguous, and that these factors were additional reasons why the Rules were unjust and unreasonable. *Id.* at 29.

The ALJ's ultimate conclusions as to the lawfulness of PRMSA's tariffs essentially excluded labor considerations:

> [A]ll shippers should be treated substantially equally, provided of course that they seek and receive the same ocean transportation service from the same ocean carrier . . . . [I]f the tariff rules provide for grossly unequal treatment of similarly situated shippers the rules are clearly unlawful under the Shipping Acts . . . .
>
> [U]nlawful tariff rule discrimination is unlawful tariff rule discrimination, regardless of the fact that it may have been caused by a work preservation rule, and it matters not at all whether the work preservation rule is lawful in and of itself. It is elemental and basic to United States transportation law, that shippers all be treated equally, whether large or small, or whether they differ in their plants, warehouse facilities or in other respects, provided only that they are buying identical transportation services.

21 F.M.C. at 29. However, the ALJ had ruled that evidence offered by CONASA regarding labor considerations was relevant because the Commission was obliged to consider the public interest in maintaining ocean commerce free from labor unrest. *Id.* at 22. Accordingly, he applied labor considerations in fashioning the remedy for PRMSA's violations. He stated that the Commission "should recognize that any order it may issue should be carefully drawn so as not to precipitate any actions which may interfere with the steady flow of ocean commerce in the Puerto Rican trade." *Id.* at 35. For that reason, he gave PRMSA three months to devise and put into effect a revised tariff that would be in compliance with the 1916 Act an the Intercoastal Act.

CONASA and PRMSA filed exceptions to the initial decision. They contended that the ALJ had erred in finding violations based on what CONASA characterized as a "per se violation" concept. CONASA argued that to constitute a violation, the dissimilarity of treatment of similarly-situated shippers under the Rules must be undue or unjust-*i.e.*, not justified by transportation factors. CONASA contended that ILA longshore services and the collective bargaining agreement that governed the provision of such services to shippers are transportation factors, which accordingly must be considered and which justified the differing treatments of certain shippers.

In rejecting CONASA's arguments and adopting the initial decision, the Commission stated:

> CONASA would have us accept the proposition that the factors which created the uneven treatment also sufficiently justify such treatment. We find this argument ingenious but unconvincing.
>
> We are of the opinion that the rules published in PRMSA's tariff were properly found by the Presiding Officer to create an anomalous condition where shippers who are similarly situated in all other transportation respects, are treated decidedly differently. Further, we agree with the Presiding Officer that the existence or not of a collective bargaining agreement which *affects* but is not *a part of* the transportation aspects of a shipper's relationship with his carrier,

need not be given overwhelming priority or weight as a transportation factor by which to justify dissimilarity of treatment. We may agree that such an agreement is a factor to be considered. However, there are other factors. The mere existence of the collective bargaining agreement does not preempt those other factors or foreclose our consideration of them. For us to adopt the contentions of respondents would be tantamount to an acknowledgment by us that a common carrier by water or other person subject to our jurisdiction could escape our jurisdiction by the simple device of voluntarily (albeit with pressure from a union) entering into an agreement which obligates the common carrier to take actions which may be or are in clear violation of the Shipping Act. We do not view the impact of the National Labor Relations Act as permitting a common carrier to disregard entirely its statutory obligations when conducting and resolving labor/management negotiations. We find that upon consideration of the transportation factors in the situation created by these rules, including the underlying ILA-CONASA agreement, the disparity of treatment under the rules is not adequately justified.

This is not an adoption of a "per se violation" concept. It is, rather, a simple acknowledgment by us that the record in this proceeding shows adoption and implementation of tariff rules which are unjust and unreasonable, and which are unduly and unreasonably prejudicial and disadvantageous because their effects are unjustified by transportation factors.

21 F.M.C. at 4 (emphasis in original) (footnote omitted). The Commission also rejected arguments that it lacked jurisdiction over PRSMA's tariff rules. These arguments did not focus on a BSA Labor exemption but rather on Justice Harlan's concurring opinion in *Volkswagen*. The Commission concluded that Justice Harlan's opinion did not support exempting PRMSA's tariffs from regulatory jurisdiction, on the ground that while *Volkswagen* involved the issue of advance approval under section 15, with the resulting delay in implementation of a collective bargaining agreement, this case involved "merely the unilateral

implementation of a rule founded in a collective bargaining agreement." *Id.* at 6.

Although the Commission adopted the initial decision in Dockets Nos. 73-17 and 74-40, its analysis differed in some significant aspects. These differences were critically noted by the Presiding Officer in his Initial Decision in this proceeding (I.D. at 36-37). Because the arguments advanced by CONASA to the Commission in *Sea-Land* regarding the proper treatment of the collective bargaining agreement are identical in many ways to the arguments now being made by the carriers and the ILA in defense of the I.D., the Presiding Officer's comments regarding *Sea-Land* are important.

It does appear, as the I.D. states, that the Commission's discussion quoted above contained an internal inconsistency. The Commission came very close to saying that a collective bargaining agreement cannot justify dissimilar treatment of shippers ("CONASA would have us accept the proposition that the factors which created the uneven treatment also sufficiently justify such treatment"). 21 F.M.C. at 4. However, the Commission went on to state that a collective bargaining agreement was a "transportation factor" after all, which should be weighed in the analysis, but that here, "upon consideration of the transportation factors in the situation created by these rules, including the underlying ILA-CONASA agreement, the disparity of treatment under the rules is not adequately justified." *Id.* Thus, the status of collective bargaining agreements in Shipping Act adjudications unfortunately was left somewhat ambiguous. Moreover, the Commission's decision failed to identify or explain (1) the other transportation factors the Commission considered; (2) its method of weighing those other factors against the collective bargaining agreement; or (3) how the Commission reached its conclusion that the other factors outweighed the collective bargaining agreement. Finally, contrary to the Commission's characterization of his analysis, the ALJ did not state or conclude that a collective bargaining agreement "need not be given overwhelming priority or weight as a transportation factor by which to justify dissimilarity of treatment." *Id.* His analysis of the lawfulness of PRMSA's tariffs gave no weight at all to the collective bargaining agreement. Rather, he took labor considerations into

account in fashioning his recommended remedy, *i.e.*, a liberal three-month period for PRMSA to adjust its tariff. Thus, while we continue to believe that *Sea-Land* was correctly decided, the Commission's relatively brief report and order adopting the ALJ's initial decision did not provide needed clarification regarding the confused and ambiguous status of "labor considerations" in Shipping Act cases.

* * * *

Following the issuance of the Commission's decision, CONASA and NYSA filed petitions for review in the U.S. Court of Appeals for the District of Columbia Circuit. While the appellate proceeding was pending, the Supreme Court issued its decision in *NLRB* v. *International Longshoremen's Association*, 447 U.S. 490 (1980), and Congress enacted the Maritime Labor Agreements Act. Each event affected the review of *Sea-Land* and requires separate analysis.

F. *The Supreme Court's Decision in NLRB* v. *ILA(I)*

Between 1973 and 1979, the NLRB had issued a series of orders finding the Rules on Containers, as applied in various port locations, to be unlawful under the National Labor Relations Act, and these orders had been enforced by the federal courts. However, in 1979, the District of Columbia Circuit issued a decision denying enforcement of the NLRB's orders in two cases in which the agency again had found the Rules unlawful.[28] Because of the conflict among circuits, the Supreme Court granted certiorari.

On June 20, 1980, by a 5-4 vote, the Supreme Court affirmed the D.C. Circuit and held that the NLRB had erred as a matter of law in applying the doctrine of work preservation to the Rules. *NLRB* v. *International Longshoremen's Association*, 447 U.S. 490 (1980) (*NLRB* v. *ILA(I)*).

The NLRB had ruled that the Rules were illegal because they did not preserve traditional work opportunities for longshoremen, but instead sought to acquire new work that longshoremen

[28] *International Longshoremen's Association* v. *NLRB*, 613 F.2d 890 (D.C. Cir. 1979).

had not performed historically. The Supreme Court stated that to be a lawful work preservation agreement, the agreement "must have as its objective the preservation of work traditionally performed by employees represented by the union. Second, the contracting employer must have the power to give the employees the work in question—the so-called 'right of control test' . . . ." 447 U.S. at 504, citing *NLRB* v. *Pipefitters*, 429 U.S. 507 (1977). The Court then indicated that fundamental to this analysis is a determination of the work that the agreement allegedly seeks to preserve. The NLRB consistently had held that the "work in controversy" was the loading and unloading of containers by employees of consolidators and truckers at off-pier locations. The Court held that the NLRB was required to focus instead on work traditionally performed by longshoremen.

> The next step is to look at how the contracting parties sought to preserve that work, to the extent possible, in the face of a massive technological change that largely eliminated the need for cargo handling at intermediate stages of the intermodal transportation of goods, and to evaluate the relationship between traditional longshore work and the work which the Rules attempt to assign to ILA members.

Id. at 509 (footnote omitted). The Court noted that, unlike previous cases it had decided involving work preservation agreements, the union here

> did not simply insist on doing the work as it had always been done and try to prevent the employers from using container ships at all . . . . Instead, ILA permitted the great majority of containers to pass over the piers intact, reserving the right to stuff and strip only those containers that would otherwise have been stuffed or stripped locally by anyone except the beneficial owner's employees.

Id. at 510.

The Court stated that with a proper definition of the work in controversy, the NLRB could determine on remand whether the Rules had a lawful work preservation objective and whether the CONASA members—the contracting employers—had the right to control the stuffing and stripping of containers.

> [The NLRB's] determination will, of course, be informed by an awareness of the congressional preference for collective bargaining as the method for resolving disputes over dislocations caused by the introduction of technological innovations in the workplace . . . . Thus, in judging the legality of a thoroughly bargained and apparently reasonable accommodation to technological change, the question is not whether the Rules represent the most rational or efficient response to innovation, but whether they are a legally permissible effort to preserve jobs.

447 U.S. at 511. The Court also specifically refused to address arguments by certain parties opposed to the Rules that the Rules violated the 1916 Act and the Intercoastal Act, stating that "[t]hese contentions present difficult and complex problems which are not properly before us." *Id.* at 512.

Chief Justice Burger, writing for the four dissenters, argued that the Rules' 50-mile limit was arbitrarily chosen, that the majority's logic could easily sanction rules applying to work done 100 miles inland, that the Rules amounted to featherbedding and that the effect of the Court's decision would be to take "work from non-ILA members to provide economically useless work for ILA members." 447 U.S. at 527.

G. *The Maritime Labor Agreements Act*

On August 8, 1980, Congress substantially altered the Commission's jurisdiction over collective bargaining agreements and other agreements involving labor interests when it enacted the Maritime Labor Agreements Act ("MLAA"), Pub. L. No. 96-325, 94 Stat. 1021. The statute and its legislative history also provide guidance regarding FMC regulation of individual carrier activities that are related to labor agreements, such as the Rules on Containers.

The MLAA, the passage of which was supported actively by the Commission before Congress, was designed specifically to negate the court and FMC decisions, including *Volkswagen* and *PMA*, which required maritime collective bargaining agreements and assessment agreements to be approved by the Commission

before going into effect. Echoing Justice Powell's dissent in *PMA*, the Senate Report stated:

> As a consequence of these court decisions, collective bargaining in the maritime industry has been seriously disrupted because the parties do not know whether they have in fact made an agreement until the Commission approves it. The maritime industry has thus been singled out as the only industry in the United States which is deprived of the benefits of the express national policy of free and unfettered bargaining without government intervention.

S. Rep. No. 854, 96th Cong., 2d Sess. 1 (1980). "The MLAA was intended to restore order and some certainty to the collective bargaining process . . . . Because of *Volkswagen*, collective bargaining agreements and assessment agreements . . . were illegal until the FMC had specifically approved them. It was the delay in approval that disrupted labor relations." *California Cartage Co., Inc.* v. *United States*, 721 F.2d 1199, 1206 (9th Cir. 1983).

The MLAA completely exempted from FMC jurisdiction under the 1916 Act (including sections 14, 16 and 17) and the Intercoastal Act all "maritime labor agreements," which were defined as including

> any collective bargaining agreement between an employer subject to this Act, or group of such employers and a labor organization representing employees in the maritime or stevedoring industry, or any agreement preparatory to such a collective bargaining agreement among members of a multiemployer bargaining group, or any agreement specifically implementing provisions of such a collective bargaining agreement or providing for the formation, financing, or administration of a multi-employer bargaining group.

46 U.S.C. § 801 (1982). If the MLAA had been in effect at the time, this exemption would have covered all three agreements presented in *BSA* and the PMA-ILWU agreement in *PMA*.

Mech Fund-type assessment agreements, such as those in *Volkswagen* and *NYSA*, were given separate, distinct treatment. Any such agreement that provided for the funding of collectively

bargained fringe benefits on a uniform man-hour basis would qualify for the general exemption from FMC jurisdiction described above. However, in order "to ensure equal treatment of shippers, cargo and localities and to prevent abuses made possible by concerted activity of ocean common carriers and others," S. Rep. No. 854, *supra*, at 2, assessment agreements that, like *Volkswagen* Mech Fund agreement, provide for fringe benefit funding on *other* than a uniform man-hour basis, regardless of the cargo handled or type of vessel or equipment utilized, remained subject to the Commission's filing and approval jurisdiction (even if they are part of a collective bargaining agreement) under the following unique procedure (94 Stat. 1021-22):

1. the assessment agreement is deemed approved upon filing so that it can be implemented immediately;

2. the approval continues unless and until the FMC sets the agreement aside or modifies it as a result of a complaint proceeding (the Commission cannot institute a proceeding on its own motion);

3. a complaint can be filed by any person affected by such an assessment agreement at any time within 2 years from the filing date.

4. the Commission is under a mandate to issue its final determination within one year from the date of filing of the complaint; and

5. to the extent that a complainant had borne, either directly or indirectly, assessment charges ultimately set aside or modified by the FMC, it is entitled to assessment adjustments from the date of the filing of the complaint in the form of prospective credits against future assessments or charges.

The Commission has issued several decisions under these complaint procedures. *Port of New York and New Jersey* v. *New York Shipping Association*, ___ F.M.C. ___, 23 S.R.R. 21, order discontinuing proceeding, 23 S.R.R. 226 (1985); *California Cartage Co., Inc.* v. *United States*, 721 F.2d 1199 (9th Cir. 1983), order on remand, ___ F.M.C. ___, 23 S.R.R. 420 (1985), *aff'd*, 802 F.2d 353 (9th Cir. 1986); *Boston Shipping Association, Inc.* v. *FMC*,

706 F.2d 1231 (1st Cir. 1983).[29] These cases typically involve a fairly narrow issue as to whether an assessment formula imposes charges on the complaining port, carrier or shipper that are not reasonably related to the transportation services or benefits accruing to the complainant (the "benefits/burdens" test). *See generally, Port of New York and New Jersey* v. *New York Shipping Association, supra*, 23 S.R.R. at 48.

In addition to preserving the FMC's authority to provide remedies for concerted unfair treatment of shippers ports or types of cargo brought about by certain kinds of assessment agreements, the MLAA stated that the provisions of the 1916 Act and the Intercoastal Act would continue to apply to:

> any rates, charges, regulations, or practices of a common carrier by water or other person subject to [the 1916] Act which are required to be set forth in a tariff, whether or not such rates, charges, regulations, or practices arise out of, or are otherwise related to a maritime labor agreement.

94 Stat. 1022. This language (commonly called the "tariff matter" provision) appeared in section 5 of the MLAA, and the Senate explained that its intention in adding the provision to the House version of the legislation was to retain "the existing protections of the Shipping Act for shippers, carriers and localities which may be adversely affected by shipping practices which may arise out of maritime labor agreements." S. Rep. No. 854, *supra*, at 13; *see also id.* at 14.

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[29] *Boston Shipping Association, Inc.* v. *FMC* concerned the lawfulness of Rule 10 of the Rules on Containers, which governs the collection and distribution to ILA members of container royalties. N.7, *supra*. During the proceedings before the Commission in that case, NYSA, intervening in defense of the Rule, contended that the Commission lacked jurisdiction over Rule 10 on the grounds that the Rule constituted a "maritime labor agreement" under the MLAA or, alternatively, that it should qualify for a non-statutory *BSA* labor exemption. The Commission found that the Rule, in its application to the Port of Boston, did not violate the 1916 Act and further found that its conclusion on the merits obviated the need to resolve NYSA's jurisdiction arguments. On review, the U.S. Court of Appeals for the First Circuit affirmed the Commission's decision on the merits and similarly did not reach the jurisdiction issue. 706 F.2d at 1235-36.

The provisions of the MLAA were carried forward into the Shipping Act of 1984. No substantive changes relevant to this proceeding were made by Congress.[30]

The MLAA's "tariff matter" provision, as now set forth in section 5(e) of the 1984 Act, 46 U.S.C. app. § 1704(e), is the legal basis for the Commission's regulatory jurisdiction over the Rules on Containers. In previous stages of this proceeding, the carriers challenged the applicability of the provision to the Rules. As we shall discuss below, the Commission rejected those arguments in the February, 1982, Interim Report and Order herein and, in its review of the Commission's *Sea-Land* decision, the U.S. Court of Appeals for the District of Columbia Circuit indicated strongly that the provision would apply to the Rules, although the court did not decide the issue.

A separate issue is whether, in enacting legislation that restricted substantially the FMC's jurisdiction to regulate labor-related agreements, Congress intended also that the Commission should apply "labor considerations," in the form of a *BSA* labor exemption or in some other manner, in adjudicating the lawfulness of individual carrier practices—such as the Rules on Containers—that arise out of a collective bargaining agreement but fall within the MLAA's "tariff matter" provision. Our review of the legislative history of the MLAA does not reveal any sign from Congress that such was its intention. On the contrary, the legislative history indicates that the Commission should not attempt to weigh "labor considerations" in deciding the lawfulness of a "tariff matter."

During the hearings in the House of Representatives in March, 1980, on H.R. 6613 (which ultimately became the MLAA, the ILA and NYSA advocated a total exemption from FMC regulation for both collective bargaining agreements and for the Rules on Containers. *Hearings on H.R. 6613 before the Subcommittee*

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[30] The 1916 Act had empowered the Commission to disapprove, cancel or modify assessment agreements found to be "unjustly discriminatory or unfair as between carriers, shippers, or ports, or to operate to the detriment of the commerce of the United States." The 1984 Act eliminated detriment to commerce as a basis for FMC action. See California Cartage Co., Inc. v. United States, 802 F.2d 353 (9th Cir. 1986).

on Merchant Marine of the House Committee on Merchant Marine and Fisheries, 96th Cong., 2d Sess. ("House Hearings") 27-47, esp. 32, 37 (Mar. 11, 1980). ILA president Gleason described the Rules in detail for the House Committee, *id.* at 39-40, and referred to the Commission's decision in *Sea-Land* (pending review before the District of Columbia Circuit) as "proof of the FMC's fundamental inexperience in this matter and its inability to flexibly and realistically apply concepts in a maritime antitrust field which it was created to administer." *Id.* at 32.

The Commission supported the bill's proposed exemption of collective bargaining agreements from the pre-implementation approval requirements of section 15, but Commissioner (then Vice Chairman) Moakley, speaking for the Commission, warned the House Committee that any exemption from the substantive prohibitions of the 1916 Act should be legislated only if Congress was satisfied that shippers, ports and cargoes would be protected adequately under other statutes, such as the antitrust laws. House Hearings at 11-12. As reported out by the Committee and passed by the House, H.R. 6613 contained a partial exemption from sections 16 and 17 of the 1916 Act for "any charge, tax or assessment imposed upon cargo or any shipper or ocean carrier to fund the fringe benefit obligations under a collective bargaining agreement . . .," as well as a complete exemption from section 15 for collective bargaining agreements and all related agreements, including assessment agreements. H.R. Rep. No. 876, 96th Cong., 2d Sess. 11-12 (1980). The only mention of the Rules on Containers in the House Report came in the context of testimony opposed to the legislation on the ground that FMC regulation was needed to prevent anticompetitive behavior. *Id.* at 4.

When the Senate considered the legislation three months later, cargo, port and consolidator interests that stood to be adversely affected offered widespread opposition to the exemption for assessment charges contained in the House bill. *See, e.g., Hearings on H.R. 6613 before the Subcommittee on Merchant Marine and Tourism of the Senate Committee on Commerce, Science and Transportation*, 96 th Cong., 2d Sess. ("Senate Hearings") 56 (Boston Shipping Association), 82 (International Association of NVOCC's), 89 (National Customs Brokers and Forwarders As-

sociation of America), 95 (Maryland Port Administration) (June 4, 1980). In addition, Commissioner Moakley, again speaking for the Commission, warned the Senate Committee that it was problematic at best whether shippers, ports and cargoes would be protected adequately by other statutes if carrier activities related to collective bargaining agreements were exempted totally from the 1916 Act. *Id.* at 17-18. Significantly, there was testimony in support of such a total exemption by the Maritime Administration of the Department of Commerce (now Department of Transportation), which argued that legislation eliminating section 15 pre-implementation review—which would also eliminate antitrust immunity—while retaining post-implementation regulation by the Commission "would be the worst of both worlds." *Id.* at 9. That agency argued that shippers and like interests would be protected sufficiently under the labor and antitrust laws. *Id.* The president of PMA, in arguing for a total exemption, warned the Senate Committee that the 1916 Act was "an integrated legislative program for regulation of steamship and terminal company rates and practices . . .[which] was not in any respect designed to deal with labor problems and indeed makes no reference to labor considerations." *Id.* at 73. The ILA and NYSA again criticized the FMC's *Sea-Land* decision and urged a complete exemption for the Rules on Containers from the 1916 Act. *Id.* at 28, 36. However, opponents of the Rules described for the Senate Committee various difficulties caused to non-vessel-operating common carriers ("NVO's") and importers by the Rules, and contended that the legislation should not immunize the Rules from the Shipping Act. *Id.* at 86-89.

Commissioner Moakley told the Senate Committee that in deciding *Sea-Land*,

> The Commission did not exercise jurisdiction over the [collective bargaining] agreement between management and labor . . ., but rather over tariff rules of individual carriers. As the Administrative Law Judge said in his initial decision, "A tariff provision is not an agreement; rather it is a unilateral statement of the author of the tariff . . . ." If the Committee does intend to exempt all activities in implementation of collective bargaining activities from

> Shipping Act scrutiny, that intent must be made clear in the bill.

Senate Hearings, *supra*, at 16. He further advised the Committee that under the law as it then stood, the Commission was not obliged to review collective bargaining agreements in order to test the defense of a carrier or other person charged with a violation of the 1916 Act and that "[a] tariff stands on its own and must be defended as a tariff." *Id.* at 12. He urged that the legislation as finally enacted should avoid creating a situation where identical practices of various carriers would be judged differently "simply by virtue of their collective bargaining obligations." *Id.* at 18. In its report, the Senate Committee took note of *Sea-Land* and then, as stated above, described the "tariff matter" provision as an indication of Congress' intent that the new exemption (as adjusted from the House bill) for maritime labor agreements did not change existing law with respect to practices reflected in carrier tariffs. S. Rep. No. 854, *supra*, at 8-9, 14. It should be noted that by the time the Senate Committee published its Report on July 16, 1980, the Supreme Court had issued *NLRB* v. *ILA(I)* and the Committee was aware of that decision. *Id.* at 9, n. 11.

When the chronology of the legislative process and the various testimonies are considered together, the MLAA can be viewed as a compromise between, in rough terms, "labor" and "shipping" interests. Most of the witnesses appearing in support of the legislation testified that their "labor" interests would be protected sufficiently if the impediment of section 15 pre-implementation approval was removed, and that they could live with the possibility that an agreement—or, more directly, practices implementing an agreement—might encounter difficulties under other sections of the 1916 Act after the agreement was implemented.[31] Even NYSA indicated that its primary interest was to

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[31] The Senate Committee summarized its hearings as follows:

> The witnesses who appeared . . . were nearly unanimous in support of exempting collective bargaining agreements from . . . section 15 of the Shipping Act. The majority of those opposing H.R. 6613 as it passed the House, however, felt the bill went beyond what was necessary to assure free and unfettered collective bargaining, and that it stripped the FMC of jurisdiction to

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remove the FMC from the collective bargaining process and that it would go along with the "tariff matter" compromise, if that was the price for legislation. *See* Senate Hearings, *supra*, at 19-20, 31. From this perspective, the legislation protects the process of free collective bargaining, rather than any particular carrier practice resulting from that *process*; such practices, if they must be set forth in the carrier's tariff, remain subject to the Shipping Acts. This result is consistent with the various pre-MLAA judicial opinions opposed to FMC jurisdiction over maritime collective bargaining agreements, beginning with Justice Douglas's dissent in Volkswagen and continuing through the D.C. Circuit's opinion in PMA and Justice Powell's subsequent dissent in that case. Those opinions argued that the proper accommodation between the Shipping act and federal labor policy required that collective bargaining agreements should be held to be outside the reach of section 15, while implementation of the agreements by the carriers would remain subject to the substantive prohibitions of the Act.

Given those facts, logic compels the conclusion that the balance between "labor" and "shipping" intended by Congress would be upset if "labor considerations" were additionally weighed by the Commission in deciding whether carrier practices set forth in tariffs are unreasonable or unjustly discriminatory in their application to persons protected by the 1916 Act or the 1984 Act. Congress gave the "labor interests" of the carriers (and the maritime unions) all the protection it thought appropriate when it exempted the collective bargaining process and most agreements resulting therefrom from section 15. Despite the testimony from the Maritime Administration, NYSA, the ILA and other witnesses in support of a total exemption, and despite the testimony from the ILA regarding its interest in the Rules on Containers and criticizing the Commission's decision in *Sea-Land*, Congress gave no indication that it thought *Sea-Land* was wrong or that "labor interests" should be given additional special con-

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> assure equal treatment of shippers, cargo and localities, and to prevent abuses made possible by one [sic] concerted activity of carriers and others.

S. Rep. No. 854, *supra*, at 10.

sideration if the Commission was called upon to adjudicate the lawfulness under the Shipping Act of a carrier tariff that had its genesis in a collective bargaining agreement.[32] The president of PMA had warned the Senate Committee that the 1916 Act did not allow for labor considerations and Commissioner Moakley had stated clearly to the same Committee that a tariff is judged only as a tariff. Nevertheless, in adding the "tariff matter" provision to the House bill, the Senate did not indicate that the Commission should adjust its standards for labor.

In sum, the underlying purpose of Congress in enacting the MLAA was that the Commission should return to judging Shipping Act issues raised by provisions in carrier tariffs by normal, historical Shipping Act standards, rather than to continue getting deeper and deeper into labor law issues, as the Commission clearly had been in cases such as *BSA* and *PMA*. The MLAA demarcated clearly between labor and shipping concerns, and removed the confusion and uncertainty that had existed previously. In carrying the "tariff matter" provision over into the 1984 Act, the Senate, the original author of the provision, described its purpose as

> . . . to preserve the essential principle that a common carrier cannot alter its statutory common carrier obligations at the bargaining table and to sharpen the jurisdictional boundaries between tariffs and agreements, leaving the latter clearly within the purview of the shipping laws and relegating the latter (with the exception of assessment agreements) to the labor laws.

S. Rep. No. 3, 98th Cong., 1st Sess. 25 (1983). Thus, if the Commission revived the *BSA* criteria or otherwise attempted to calibrate labor policies or objectives in deciding Shipping Act

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[32] ILA president Gleason had stated in strong terms that his union had no interest in what carriers put in their tariffs:

> And one thing I would like to get over to you, Mr. Chairman is this: That this union does not talk about tariffs. I think that is the companies' business; it's none of our business at all. We do not talk about tariffs. We do not negotiate tariffs at all.

Senate Hearings, *supra*, at 33.

issues, it appears that we would be going against the will of Congress.

H. *Institution of Docket No. 81-11 and Issuance of the Commission's Interim Report and Order*

As a result of the Supreme Court's decision in *NLRB* v. *ILA(I)*, the Rules on Containers were reimplemented briefly by the carriers and the ILA at Atlantic and Gulf Coast ports from January 2, 1981, to February 27, 1981.[33] Implementation of the Rules during this period, however, was haphazard and done on the initiative of individual carriers acting on their own interpretations of the Rules. Further, the carriers did not adopt any formal procedures for the identification of containers affected by the Rules, but instead relied on information from customary shipping documents.[34] At the end of February, the NLRB obtained a new injunction barring enforcement of the Rules pending completion of its proceedings on remand from the Supreme Court.[35] This two-month period of implementation of the Rules became the period of record for this proceeding, Docket No. 81-11, which had been instituted a few weeks earlier on February 3, 1981.

In the Order of Investigation commencing this proceeding, 46 Fed Reg. 11,357 (Feb. 6, 1981), the Commission stated that it had reason to believe that, commencing January 1, 1981, ocean common carriers in the foreign and domestic offshore commerce of the United States had been engaged in practices related to the Rules on Containers that may violate the 1916 Act and the Intercostal Act. The Commission stated that these practices included:

> [r]efusal to load container cargo aboard vessels without interruption, delay or stripping and restuffing of the container and/or trailer; refusal to deliver container cargo

[33] The Presiding Officer found that an injunction remained in effect at Philadelphia during this period. I.D. at 65.

[34] I.D. at 65-66.

[35] *Pascarell* v. *New York Shipping Association, Inc.* No., 81-13 (D.N.J.), *aff'd*, 650 F.2d 19 (3d Cir.), *cert. denied*, 454 U.S. 832 (1981). Although the injunction standards of the labor laws do not require the usual showing of irreparable harm, this injunction apparently was based in part on arguments that the Rules threatened the livelihood of freight consolidators. 650 F.2d at 21, 22.

> without delay or stuffing and restuffing of the container and/or trailer; refusal to accept container bookings and confirm space on vessels; refusal to supply or make available containers, trailers or other equipment which is owned, leased or used by the carrier, for loading of cargo at NVOCC's, consolidator's and/or shipper's premises; refusal to load cargo unless shipped "loose" to port and stuffed in containers and/or trailers at the pier; passing on to individual NVOCC's, consolidators, and/or shippers any penalties or fines assessed the carrier for violation of the 50 Mile Container Rules should they occur; and imposing additional charges for stripping and restuffing containers and/or trailers at the pier. In addition, the carriers have apparently failed to reflect these practices in their tariffs.

Id. at 11,358. The substantive statutes listed by the Commission as involved in this proceeding were sections 14 Fourth, 16 First, 17, 18(a) and 18(b) of the 1916 Act and sections 2 and 4 of the Intercoastal Act. The Order of Investigation listed 142 carrier respondents. The proceeding initially was limited to the submission of affidavits and memoranda directly to the Commission.

The ILA, NYSA and CONASA intervened in support of the Rules. Intervening in opposition were the International Association of NVOCC's, an unincorporated trade association of non-vessel-operating common carriers; the National Customs Brokers and Forwarders Association of America, Inc. ("NCB FAA"); the Florida Customs Brokers and Forwarders Association; the American Warehousen en's Association ("AWA"); and the American Trucking Associations ("ATA"), whose members are state trade associations representing interstate truckers. The Commission's Bureau of Hearing Counsel also was made a party to the proceeding.

On February 5, 1982, after the parties had submitted their initial pleadings, the Commission issued an Interim Report and Order.—F.M.C.—21 S.R.R. 544. The number of respondents was reduced to 122 as 17 carriers were dismissed from the proceeding because they had shown by affidavit that they were not common carriers by water, did not offer service at ILA ports

along the Atlantic and Gulf Coasts, or carried no containers. *Id.* at 547, 561.[36] In order to expedite the proceedings and to focus more on the allegedly discriminatory aspects of the Rules, the Commission also announced that it was removing as issues in the proceeding whether civil penalties should be assessed for violations of law found against any carrier respondent, and whether any of the carriers had violated section 18(b) of the 1916 Act or section 2 of the Intercoastal Act by implementing specific Rules on Containers practices that were not published in their tariffs. *Id.* at 545, n. 1, 554.

The Commission then addressed certain legal issues that had been raised by the parties. We held that the "basic features" of the Rules must be published in the carriers' tariffs, because the Rules affect the "privileges and facilities" offered by carriers (*i.e.*, their containers and piers) and may result in changes to the rates and charges paid by shippers. *Id.* at 554-55. The Commission also held that the "tariff matter" provision of the MLAA did not diminish our authority to regulate carrier practices that must be set forth in tariffs, *id.* at 555-56, and that the Rules should not be granted a *BSA* labor exemption because, by being published in carrier tariffs, they are imposed on persons outside the collective bargaining process, including shippers and consolidators, and thus fail to meet the third *BSA* criterion. *Id.* at 556. In this regard, the Commission also stated:

> The Container Rules have a direct and practical impact upon both labor and shipping interests. Nonetheless, a Commission order prohibiting this particular method of resolving labor/management conflict as an unjust ocean carrier practice would not undermine the basic collective bargaining process created by the National Labor Relations Act, whereas the absence of Shipping Act regulation would eliminate the fundamental premise of the Shipping Act and

[36] Three additional carriers had been dismissed by Commission order on June 12, 1981.

other common carrier statutes—that similarly situated shippers be treated equally.*

* It is the integrity of the collective bargaining *process* and not the value of each bargained for benefit which must be balanced against the Shipping Act's guarantees of fair, essentially equal treatment. The effect of regulating ocean carrier practices under Shipping Act sections 14, 16, 17 and 18 is significantly different from the effect of subjecting collective bargaining agreements to the advance filing and approval requirements of section 15. Even if remedying a discriminatory tariff practice presented a plain choice between the protection of a particular union and protection of a particular class of ocean shippers, the more specific legislative purpose of the Shipping Act requires that the Commission choose the latter—provided the final action taken is no broader than necessary to remedy the unjust discrimination in question.

Id. at 557 (other footnote omitted) (emphasis in original).

Having rendered those conclusions of law, the Commission stated that it was necessary to develop further certain factual issues in order to determine "which Shipping Act sections have been violated by which of the remaining Respondents." 21 S.R.R. at 560. The Commission further stated that the parties

> may introduce such additional evidence as the Presiding Officer deems relevant to whether the Container Rules, as presently formulated, create discriminations or commercial burdens so unreasonable as to violate the above-referenced Shipping Act sections. Because the Commission has today ruled that the Container Rules are not exempt from Shipping Act regulation, despite their inclusion in ILA collective bargaining agreements, no further evidence regarding labor conditions shall be accepted by the Presiding Officer. If the Respondents have a defense to the Shipping Act violations alleged in the Order of Investigation, it must be a defense relating to transportation conditions, not national labor relations policy.

Id. at 561.[37]

[37] Commissioner Moakley issued a separate opinion that concurred in the majority's result but argued that the reference to the *BSA* labor exemption was contrary to the intent of the MLAA. 21 S.R.R. at 562.

The ILA and the carriers filed a petition for review of the Interim Report and Order in the U.S. Court of Appeals for the District of Columbia Circuit. *New*

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I. *The District of Columbia Circuit's Review of "Sea-Land"*

On March 2, 1982, less than a month after the Commission issued the Interim Report and Order in Docket No. 81-11, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision on review of the Commission's 1978 *Sea-Land* decision on the Rules on Containers. *Council of North Atlantic Shipping Associations* v. *FMC*, 672 F.2d 171 (D.C. Cir.), *cert. denied*, 459 U.S. 830 (1982) ("*CONASA*").[38] The Court reviewed the history of containerization, the labor difficulties and negotiations, and the development of the Rules. It summarized the competing interests thusly:

> The Rules on Containers impose burdens on importers, exporters, consolidators, distributors, and others within the 50-Mile zone. If containers could move freely across the pier without ILA handling, regardless of the identity of the shipper, the place of origin, or the destination, then small shippers within the 50-Mile zone could take full advantage of the benefits of container shipping. In contrast, the stuffing and stripping requirements allegedly increase shipping delays and labor costs, augment the risk of loss, pilferage, and damage in transit due to improper stowage, and deprive the shippers of the special services provided by consolidators. NVO's and distributors previously operating within the 50-mile zone have been severely affected and in some cases have been forced to cease operations.
>
> On the other hand, the 50-mile rule and the enforcement provisions of the Dublin Supplement have averted further reductions of employment opportunities for ILA

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York Shipping Association, Inc. v. *FMC*, D.C. Cir. No. 82-1347. The case subsequently was terminated without prejudice to its reinstatement following issuance of the Commission's final decision in this proceeding.

[38] CONASA's petition for review had been timely filed in 1978, but the court had held the case in abeyance at the request of the parties, pending the outcome of the related labor law litigation, which culminated in *NLRB* v. *ILA(I)*. *See* 672 F.2d at 179, n. 66. Following the Supreme Court's remand in that case, an NLRB administrative law judge had issued on September 29, 1981, an initial decision under the corrected legal definition of "work in controversy." *Id.* at 173, n. 4. His decision upheld the 50-Mile Rules in large part. *Id.* at 180. The proceeding was before the NLRB at the time the D.C. Circuit decided *CONASA*.

> longshoremen and have reduced labor management strife on the waterfront. Petitioners warn that if the Rules are set aside, the longshoremen may renew their demand for stripping and stuffing of all containers, not only those subject to the 50-mile rule. "Economic warfare would be the inevitable result," petitioners contend.

672 F.2d at 177-78 (footnote omitted) (citing petitioners' reply brief at 15-16). Petitioners CONASA and NYSA addressed their briefs solely to jurisdictional issues, asserting that they would hold their challenge to the merits of *Sea-Land* "in reserve." *Id.* at 179. They contended that the Commission completely lacked jurisdiction over the Rules as set forth in PRMSA's tariff, because the provisions in question were work preservation rules derived directly from a collective bargaining agreement and as such were within the exclusive jurisdiction of the NLRB. They further contended that the Rules as applied by PRMSA were not covered by the "tariff matter" provision of the MLAA and therefore were not within the Commission's jurisdiction and, in any event, should have been granted a nonstatutory *BSA* labor exemption.

The court first examined the nature of the NLRB's jurisdiction and held that that agency's examination of the Rules differs substantially from the FMC's. It stated that "[t]he Rules govern the relationship between labor and management; incorporated into tariff provisions filed by steamship companies, they also govern the relationship between shipping customers and steamship operators." 672 F.2d at 180-81. It concluded that the NLRB does not have exclusive jurisdiction over the Rules because "[t]he NLRB's interpretation of [the National Labor Relations Act] does not answer the questions the FMC is required to ask—do the Rules unduly discriminate against certain shippers, and are they unjust and unreasonable?" *Id.* at 181 (footnote omitted).

The court then stated that the MLAA's "tariff matter" provision "appears to retain existing FMC jurisdiction over the Rules on Containers." 672 F.2d at 182. The court cited the MLAA's legislative history and "well established shipping law doctrine" that all terms and conditions relating to a carrier's acceptance and carriage of cargo must be set forth in its tariffs.

Id.[39] However, the court declined to actually rule on the scope of the "tariff matter" provision, choosing instead to rule more narrowly that section 6 of the MLAA specifically stated that the statute had no effect on existing FMC jurisdiction as applied to any formal proceeding commenced prior to the statute's effective date, which clearly included the *Sea-Land* Dockets Nos. 73-17 and 74-40.

With regard to CONASA's final argument concerning the applicability of a non-statutory *BSA* labor exemption to PRMSA's Rules on Containers, the court first stated:

> No judicial precedents address the precise issues raised in this case: whether any labor-management agreements are exempt from the substantive provisions of the shipping laws, and, if so, whether enforcement of the collectively-bargained Rules on Containers qualifies for exemption. Prior cases delineating the nonstatutory labor exemption from the shipping laws have dealt with the pre-implementation filing and approval requirements of Section 15 of the Shipping Act of 1916, not with the prohibitions against unreasonably discriminatory and unjust rates and practices in Sections 14, 16, and 18.

672 F. 2d at 183 (footnote omitted).

The Commission had advanced two grounds for denying a labor exemption for the Rules. First, the Commission argued that the *BSA* exemption applied only to section 15 approval issues and not to any other section of the 1916 Act. Second, the Commission argued that, even assuming that a labor exemption could be applied properly to the substantive provisions of that Act and to tariffs as well as agreements, the Rules on Containers do not satisfy the *BSA* criteria. The court's ruling turned on the latter argument. After noting that the other three *BSA* criteria were apparently met, 672 F.2d at 187, n. 127, the court held that the Rules did not qualify for an exemption because they are imposed on third parties outside the collective bargaining agreement and therefore fail to meet the third *BSA* criterion. The court acknowl-

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[39] The court cited authorities identical to those relied upon by the Commission for the same conclusion in its Interim Report and Order in this proceeding. 672 F.2d at 182, n. 96-98; 21 S.R.R. at 554-55.

edged that the antitrust cases involving a labor exemption question had focused on the collective bargaining agreement's alleged effect on the employer's own competitors, but held that in the shipping context, it was appropriate to broaden the focus to include effects on the carriers' customers as well as their competitors. *Id.* at 187-88, n. 131 and accompanying text. The court stated:

> [T]he Rules have direct and probable effects on shippers' interests and on competition in the shipping industry, both of which are subject to FMC regulation. The record fully documents the impact that enforcement of the Rules would have on importers, exporters, consolidators, distributors, and others who transport goods by sea. Consolidators are competitors as well as customers of the steamship lines, offering alternative arrangements for ocean transportation of smaller shipments. Those consolidating companies which previously operated within the 50-mile zone are deprived of business under the Rules, or subjected to substantial cost increases and shipping delays, in order to preserve the work opportunities of longshoremen employed at the docks by steamship operators.

Id. at 188 (footnote omitted).

Having thus disposed of the petitioners' jurisdictional arguments, the court, on its own initiative, remanded the proceeding back to the Commission for reconsideration of its decision on the merits. The court said that the Commission had not examined the implications of the Supreme Court's decision in *PMA*, which the D.C. Circuit stated "asserts the importance of labor policy in reaching substantive shipping law decision," 672 F.2d at 189, and the Supreme Court's decision in *NLRB v. ILA(I)*, which the D.C. Circuit stated "discusses the role of collective bargaining in resolving the problems created by technological job displacement." *Id.*

Judge MacKinnon issued a separate opinion in which he concurred, with some reservations, with the majority's disposition of the jurisdiction arguments advance by the petitioners. In that connection, Judge MacKinnon stated:

> There is a very substantial distinction between collective bargaining agreements . . . on the one hand, and tariffs on the other. This distinction was brought to the attention of Congress in hearings on the MLAA both by the FMC *and* by the Union; the result was the explicit distinction in section 5 of the MLAA between maritime labor agreements and matters "required to be set forth in a tariff." As intervenors rightly suggest, to ignore the distinction would be to reduce the incentive of a carrier—even one bargaining at arm's length—to bargain for labor agreements that are consistent with the Shipping Act's policies.
>
> It must be remembered that the Shipping Act has as its primary purpose the protection of *shippers*, not carriers. From the standpoint of the shipper, the terms set forth in a tariff are the same regardless of whether they had their genesis in a collective bargaining agreement; the tariff is the only statement of terms imposed "directly" upon the shipper. National labor policy, while it may require that the FMC be kept out of the labor-management bargaining process, does not prohibit the FMC from applying the substantive provisions of the Shipping Act to protect shippers from being forced to bear the cost of carriers' losses at the bargaining table merely because they were incorporated in a collective bargaining agreement.

672 F.2d at 191 (footnotes omitted) (emphasis in original). However, he dissented from the court's decision to remand the case to the Commission, arguing that there was nothing in either *PMA* or *NLRB v ILA(I)* "that would cause the FMC to consider any questions of fact or law not previously considered and ruled upon." *Id.* at 192.

J. *Developments Subsequent to "CONASA"*

On May 19, 1982, the Commission issued two orders. The first was issued in this proceeding and was entitled "Amendment of Interim Report and Order." 21 S.R.R. 845. Therein, the Commission stated that the D.C. Circuit's decision in *CONASA* "made clear that labor policy factors must be considered in Shipping Act deliberations, "*id.* at 846, and that the statement in the Interim Report and Order excluding any further evidence regard-

ing labor conditions would be rescinded. The Interim Report was amended further by the addition of a new ordering paragraph, which stated:

> IT IS FURTHER ORDERED, That the parties may present evidence and otherwise address the nature and extent of any labor policy consideration which might affect the lawfulness of the Container Rules under the sections of the Shipping Acts here at issue and the remedy to be applied for any violations of such sections . . . .

Id. Commissioner Moakley concurred in the Commission's action only to the extent that labor consideration would be relevant the Commission's eventual choice of remedy for any 1916 Act violations. He otherwise argued that the Commission majority had interpreted *CONASA* too broadly. *Id.* at 846-47.

The second Commission order of May 19, 1982, entitled "Report and Order on Remand," was issued in Dockets Nos. 73-17 and 74-40. 21 S.R.R. 852. That order advised that, pursuant to the D.C. Circuit's order of remand, the Commission had "applied the teachings of *PMA* and *ILA* to the record of this proceeding and [was] convinced that neither requires any changes in the substantive scope of our earlier determinations made under the shipping statutes." *Id.* at 853. The Commission submitted that "*PMA* says nothing about the process of applying the shipping laws to labor related conduct aside from the expressed need of the Commission to be sensitive to labor concerns in making such application, " *id.*, and that *NLRB v. ILA (I)* dealt only with obligations under the labor laws and specifically refused to reach Shipping Act issues. The Commission reviewed its *Sea-Land* decision and pointed out that it had thoroughly discussed the origin of the Rules on Containers in collective bargaining agreements and had acknowledged the ILA's interest in preserving jobs in the face of declining man-hours. However, the Commission reiterated that "the unreasonable and discriminatory effects of PRMSA's tariff rule upon certain classes of shippers" (*id* at 854) rendered the rule unlawful under the 1916 Act.[40] The Commission asserted that it

[40] The Commission summarized the grounds for its action as follows:

> First, the Commission held that requirements that loaded containers be stuffed and stripped on the piers, that containers not be given to consolida-

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had considered labor concerns to the extent appropriate by proceeding cautiously in fashioning its remedy, which was limited to a cease and desist order that allowed PRMSA to design its own corrected tariff. The Commission stated that "[a]lthough this remedy bars certain particular methods of resolving labor/management conflicts, it in no way undermines the collective bargaining process itself. The Commission asserted no jurisdiction over any portion of the collective bargaining agreement." *Id.* at 857.

Having thus responded to the D.C. Circuit's order of remand, the Commission again discontinued Dockets Nos. 73-17 and 74-40. We noted that Docket No. 81-11 had been instituted to determine the lawfulness of practices of numerous carriers, including PRMSA, arising out of the Rules contained in the new (1980) collective bargaining agreement. In that connection, we stated:

> Nothing stated herein is to be construed as a prejudgment of any issues raised in Docket No. 81-11. The parties in that proceeding are free under the terms of the amended In-

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tors, and that inbound cargo not delivered to a shipper operating its own warehouse be stuffed and stripped on the piers unless stored for 30 days prior to delivery, were unjust and unreasonable within the meaning of Section 18(a) of the Shipping Act, 1916 and Section 4 of the Intercoastal Shipping Act, 1933 (46 U.S.C. § 817 and § 845a). The basis for this finding was that: (a) there existed no transportation justification for the transfer on the piers of cargo already in containers into other containers, or the payment of a transfer charge for such service; (b) the assessment of penalties against shippers when containers were not stuffed and stripped bore no relationship to the cost of transportation or the handling of the container; (c) the rules were ambiguous on their face; and (d) the rules were discriminatory.

Second, the Commission held that PRMSA rules [sic]: (a) unfairly treated and unjustly discriminated against consolidators by denying them transportation facilities (*i.e.*, containers) furnished other shippers, and making other transportation facilities (*i.e.*, piers) unequally available to shippers in violation of section 14, Fourth of the 1916 Act (46 U.S.C. § 312); and (b) unduly and unreasonably preferred certain shippers and consignees and unduly and unreasonably prejudiced and disadvantaged other shippers and consignees in violation of Section 16, First of the 1916 Ac t (46 U.S.C. § 815) by permittimg shippers or consignees who load or unload containers at their own facilities with their own employees to avoid restuffing and restripping on the piers, while requiring otherwise similarly situated shippers and consignees to have their continues restuffed and restripped on the piers and to pay an additional charge for such service.

21 S.R.R. at 855 (footnotes omitted).

terim Order [issued the same day to address the influence of *PMA* and *ILA* with respect to the record to be developed in that proceeding. This order is restricted to an analysis of *PMA* and *ILA* as they apply to the evidentiary record and decision of the Commission in Dockets 73-17 and 74-40.

21 S.R.R. at 858

However, on July 2, 1982, the D.C. Circuit issued a "Supplemental Opinion Following Remand," unofficially reported at 21 S.R.R. 1057. The court vacated the Commission's dismissal of Dockets Nos. 73-17 and 74-40, and ordered the Commission to defer further action in those proceedings until the Supreme Court acted on a pending petition by CONASA for certiorari regarding the D.C. Circuit's decision and until the Commission completed this proceeding, which the court said "may shed further light on the shipping law issues involved" in Dockets Nos. 73-17 and 74-40. *Id.* at 1058. The court then denied on September 23, 1982, a petition by the Commission for rehearing *en banc* with regard to the Supplemental Opinion.

The Supreme Court denied certiorari on October 4, 1982. 459 U.S. 830. On November 18, 1982, the Commission issued an order reopening Dockets Nos. 73-17 and 74-40 and staying all action in them pending further order.

K. *The Final NLRB Litigation*

On February 28, 1983, the NLRB issued a decision adopting the findings and recommendations of an administrative law judge that, under the proper standard of law as defined by the Supreme court in *NLRB v. ILA(I)*, the Rules on Containers represented a lawful work preservation agreement, except as they applied to a trucking practice know as "shortstopping" and certain warehousing practices.[41] *International Longshoremen's Association (Dolphin Forwarding, Inc.)*, 266 N.L.R.B. 230 (1983), *aff'd in*

[41] "Shortstopping" is the loading or unloading of full shipper-load containers by truckers at their own pier terminals in connection with surface transportation. For example, on import cargo, truckers sometimes unload cargo at their local terminal and then reload it in order to combine smaller loads into one cargo truckload for inland delivery, or to comply with local safety regulations. The traditional warehousing practices at issue included the ongoing storage of a manufacturer's goods for distribution on short notice to customers based on future orders, and the ongoing storage of a company's purchased inventory for distribution on short notice to its foreign facilities as demand required.

part and rev'd in part sub nom. American Trucking Associations, Inc. v. NLRB, 734 F.2d 966 (4th Cir. 1984), *aff'd sub nom. NLRB v International Longshoremen's Association*, 473 U.S. 61 (1985) (*NLRB v. ILA (II)*). The NLRB specifically defined the "work in controversy" as "the initial loading and unloading of cargo within 50 miles of a port into and out of containers owned or leased by shipping lines having a collective bargaining relationship with the ILA." 266 N.L.R.B. at 236.[42] The NLRB further found that the 50-mile zone was based on a compromise worked out by the ILA and NYSA in 1968, which was intended to preserve for longshoremen that portion of the total container work in the Port of New York that they actually were performing at the time(approximately 20 percent).

The NLRB petitioned the U.S. Court of Appeals for the Fourth Circuit for enforcement of its orders with respect to shortstopping and the warehousing practices, while petitions for review of the NLRB's decision were filed by trucking, consolidator and warehousing interest. In the meantime, on April 18, 1983, the Rules were reimplemented to the extent permitted by the NLRB's decision.[43]

The Fourth Circuit held on May 9, 1984, that the NLRB's general determination that the Rules were a lawful work preservation agreement under the two-step approach set forth by the Supreme Court in *NLRB v. ILA(I)* was supported by substantial evidence. However, the court reversed the NLRB on the shortstopping and warehousing issues. The court's decision was

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[42] The Board did not discuss the administrative law judge's rejection of an argument made by opponents of the Rules that the steamship lines did not have the "right to control" the stuffing and stripping of containers-the second part of the Supreme Court's test established in *NLRB v. ILA(I)*. The opponents had argued that because the FMC had found in *Sea-Land* that the Rules were unlawful under the 1916 Act, the ocean carriers could no longer control the work preserved by the Rules. The ALJ ruled that the FMC decision was to be regarded as having no influence upon the review of the Rules under the labor laws. 266 N.L.R.B. at 267.

[43] A subsequent attempt by the FMC in 1983 to enjoin the Rules pending completion of this investigation was unsuccessful. The district court found that the equities presented to it were essentially equal, rather than strongly favoring the plaintiff, as the law requires. *United States v. ABC Containerline N.V.*, 572 F.Supp. 150 (S.D.N.Y.), *protective appeal dismissed*, No. 83-6354 (2d Cir. Dec. 13,1983).

based solely on labor law considerations. It contains no reference to the impact of the Rules on consolidators or other third parties; the court stated that "it is not our function as a court of review to weigh the economic cost of the Rules." 734 F.2d 966, 979.

The NLRB then petitioned the Supreme Court to review the Fourth Circuit's holding with respect to the shortstopping and warehousing issues, while opponents of the Rules sought a review of the question of the legality of the Rules in their entirety. The Supreme Court granted certiorari to review only the issues raised by the NLRB. 469 U.S. 1188 (1985); 473 U.S. at 73.

In a 6-3 decision issued on June 27, 1985, the Supreme Court affirmed the Fourth Circuit and held that the Board erred in two respects:

> In our view, the Board committed two fundamental errors. First, by focusing on the effect that the rules may have on "shortstopping" truckers and "traditional" warehousers, the Board contravened our direction that such extra-unit effects, "no matter how severe," are "irrelevant" to the analysis .... "So long as the union had no forbidden secondary purpose" to disrupt the business relations of a neutral employer . . ., such effects are "incidental to primary activity."
>
> Second, we believe the Board misconstrued our cases in suggesting that "eliminated" work can never be the object of a work-preservation agreement. Technological innovation will often by design eliminate some aspect of an industry's work .... "Elimination" of work in the sense that it is made unnecessary by innovation is not of itself a reason to condemn work preservation agreements . . .; to the contrary, such elimination provides the very premise for such agreements.

473 U.S. at 79, 80-81 (citations omitted). Thus *NLRB v. ILA(II)* also specifically excluded from consideration the effect of the Rules on outside parties. The Court concluded by addressing the argument raised by the dissent that the Rules are an illegal effort by the ILA to frustrate full implementation of the technological advances attributable to containerization. The Court indicated that there was no basis for this position in view of (1) Congress'

commitment to the resolution of labor disputes through the collective bargaining process, and (2) the lack of any support in the labor statutes of the argument that Congress intended to prohibit arrangements such as the Rules on Containers as their response to the adverse effects upon workers resulting from changing technology. The Court stated:

> Under the Rules on Containers, the ILA has given up some 80% of all containerized cargo work and the technological "container revolution" has secured its position in the industry. We have often noted that a basic premise of the labor laws is that "collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole . . . ." The Rules represent a negotiated compromise of a volatile problem bearing directly on the well-being of our national economy.

Id. at 84 (citation omitted). Thus, after twelve years of litigation, the lawfulness of the Rules on Containers under the federal labor statutes was established conclusively.

The decisions by the NLRB and the courts have made it clear that the heart of the Rules on Containers, and the chief concern of the ILA, are the loading and unloading of containers within 50 miles of the ocean pier. Those activities were deemed to be preservation of work traditionally performed by ILA longshoremen. However, other provisions of the Rules that, for example, distinguish between beneficial owners of the cargo and other shippers, *i.e.*, *NVO's*, and require that NVO cargo must be stuffed and stripped, that forbid carriers from providing containers to NVO's and other consolidators, and that provide a "warehouse exception" for import cargo but not for export cargo, were not even discussed, let alone approved, by the NLRB and the courts. There is no basis for according any labor policy considerations to those provisions, which essentially are mechanisms devised by the ILA and acquiesced to by the carriers to enforce the work preservation policies embodied in the actual stuffing and stripping provisions.

L. *Further Proceedings in Docket No. 81-11*

Following the Commission's May 19, 1982, amendment of its Interim Report and Order to allow for the introduction of evidence relating to labor factors, this investigation continued before the Presiding Officer. On June 14, 1982, two additional carriers, Central Gulf Lines and Pan American Line, were dismissed as respondents. Public hearings were held in Washington, D.C. on April 19-22, 25 and 27-29, July 6 and August 4, 1983. More than 200 exhibits were admitted into evidence. After the close of briefing, Congress enacted the Shipping Act of 1984 on June 18, 1984. The Presiding Officer then ordered the parties to file supplemental memoranda on the application of the 1984 Act to this proceeding. On February 13, 1985, the Presiding Officer served his initial Decision, which found no violations of law. After Exceptions and Replies to Exceptions were file by the parties, the Commission heard oral argument on February 20, 1986.

1. *The Initial Decision*

The Presiding Officer found that the Rules on Containers are not justified by transportation conditions and, in a "traditional" Shipping Act proceeding, would violate the 1916 Act, the 1984 Act and the Intercoastal Act. I.D. at 53, 60-61, 66-68. However, he believed that the Rules instead must be judged by the Commission under a standard that includes "labor considerations." As already noted, he found certain flaws and inconsistencies in the Commission's *Sea-Land* decision against the Rules. *Id.* at 30, *et seq.* In addition, he construed the District of Columbia Circuit's *CONASA* review of *Sea-Land*, including the court's post-decision "Supplemental Opinion Following Remand," as an indication that the court was unhappy with the Commission's treatment of labor factors in *Sea-Land.* However, he acknowledged that "[t]he Court did not . . . give even the slightest hint as to just what it was in the Commission's handling of the issue that caused it concern." *Id.* at 33.

The Presiding Officer proposed a new methodology to reconcile "labor policy" with the Shipping Acts. He revived the *BSA* labor exemption test and stated that the four *BSA* criteria "are relevant to a judgment that a carrier's activity which might violate

the shipping statutes is 'justified' by 'labor policy considerations.'" I.D. at 44. Here, he pointed out, three of the four *BSA* criteria have already been settled by the NLRB and the courts: the underlying collective bargaining was in good faith over a matter of legitimate concern to the union and not tainted by a conspiracy between labor and management. The Presiding Officer focused on the remaining *BSA* criterion, *i.e.*, whether the collective bargaining agreement imposed its terms on entities outside the collective bargaining group.

As applied to the Rules on Containers, he constructed a test based on this criterion whereby business harm done to outside entities, *i.e.*, shippers, consolidators, etc., by the Rules would be balanced against the benefits derived by the ILA from the Rules. I.D. at 45-50. He conceded that injury is not an essential element in "traditional" FMC cases involving allegedly discriminatory or unreasonable practices, *id.* at 50, and that his own "balance of interests" test had difficulties of its own,[44] but he proceeded to hold that the Rules' opponents had failed to meet their burden of proving that they had suffered measurable harm from the Rules. *Id.* at 51-52. The Presiding Officer had analyzed at the beginning of his decision the testimony and other evidence proferred by the Rules' opponents. *Id.* at 8-28. He found such evidence to be unsupported by specific quantification of business loss and too vague and generalized. *Id.* at 51. He therefore concluded that under his "balance of interests" test, no violations of law had been established under any of the relevant statutes (including sections 10(c)(1)-(2) of the 1984 Act, *id.* at 70-74).[45] Because he

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[44] In this connection, the Presiding Officer observed that the Rules posed issues that are essentially social, *i.e.*, "which of two classes of society, business or labor, must bear the brunt of a particular technological innovation," and perhaps should be resolved through the legislative rather than adjudicative process. I.D. at 51, n. 44.

[45] Section 10(c) of the 1984 Act states that:

> No conference or group of two or more common carriers may —
>
> (1) boycott or take any other concerted action resulting in an unreasonable refusal to deal ; [or]
>
> (2) engage in conduct that unreasonably restricts the use of intermodal services or technological innovations . . . .

46 U.S.C. app. § 1709(c).

found that the Rules' opponents had failed to meet the burden assigned to them by his test, the Presiding Officer made no findings regarding the extent of actual benefits realized from the Rules by the ILA.[48]

2. *Exceptions*

a. Carriers/ILA

Despite their success before the Presiding Officer, the carrier respondents and the ILA submitted joint Exceptions to "a few subsidiary findings and conclusions, none of which undermines the fundamental soundness of [the Presiding Officer's] decision." Respondents' Exceptions at 2. First, they except to the Presiding Officer's conclusion that the entities represented by the Rules' opponents are "shippers." *See* I.D. at 52-53. The significance of this argument lies in the fact that certain sections of the 1916 Act are limited by their terms to transactions involving shippers. The carriers/ILA contend that truckers, warehousemen, freight forwarders and customs brokers are not shippers because they have no beneficial interest in the cargo and have no involvement with its ocean transport other than in providing services to actual shippers. They concede that NVO's are shippers in their relationship with the vessel-operating ocean carrier, but insist that for purposes of this proceeding, the interest at stake for NVO's should be defined narrowly as the loading and unloading of containers, which is a carrier function, not a shipper function. They argue that the passage of the 1984 Act, which for the first time contained a specific definition of an NVO, made no important difference.

The remainder of the Exceptions submitted by the carriers/ILA essentially concern the Presiding Officer's finding that, were it not for "labor considerations," the Rules on Containers would violate the shipping statutes. They emphasize that every one of the statutes in issue requires that conduct must be unreasonable in order to be illegal, and that the Presiding Officer erred in disregarding labor considerations as part of his "reasonableness"

[48] The Presiding Officer noted briefly the dispute among the parties whether containerization in fact had been the major cause of loss of ILA man-hours in New York. I.D. at 29-30.

analysis. They argue that labor considerations may not be limited to the role of justifying offenses already found, on the ground that such an approach amounts to a *per se* analysis whereby all discrimination is unlawful. They further contend that the Rules are not unreasonable even if they are judged solely from a transportation standpoint, because the Rules' opponents have not proved specific harm and because the 50-mile zone allows shippers whom they describe as being truly in a position to benefit from intermodalism—that is, LCL shippers outside the zone and FSL shippers who load and unload at their own facilities—to do so. They state that it is not sufficient to show some adverse effects on NVO's, consolidators and warehousemen because the labor laws establish that impact on third parties of a valid collective bargaining agreement is irrelevant. They submit that even NVO's benefit from the Rules, because the labor accord represented by the Rules permitted containerization to flourish, without which NVO's could not do business; the carriers/ILA state that if the Commission invalidates the Rules, the union will assert its work preservation jurisdiction over all cargo passing over the piers, because no alternative to the Rules has been devised.

The carriers and the ILA apply similar arguments to sections 10(c)(1)-(2) of the 1984 Act, which they emphasize bar only "unreasonable" refusals to deal and restrictions on technological innovation. They also contend that they have not refused to deal at all, that the carriers are prepared to accept all cargo brought to the piers in a manner consistent with the Rules. They further suggest that these sections of the 1984 Act may not apply to the carriers' implementation of the Rules, because concerted action to implement a collective bargaining agreement falls within the "maritime labor agreement" exemption of the MLAA.

b. International Association of NVOCC's/Florida Custom Brokers and Forwarders Association

These opponents of the Rules contend that the Rules are illegal because they allocate the total burden of alleviating the ILA's job losses from containerization on one small segment of the shipping public that benefits from containerization, *i.e.*, NVO's and others within the 50-mile zone. They argue that the Presiding Officer erred in requiring that specific monetary damage must be

shown to prove harm, and that they adduced sufficient evidence from which inferences of harm reasonably may be drawn. They further submit that the carriers and the ILA must justify any recognition of labor considerations by proving that the Rules actually have succeeded in returning work to the union, and that it is not sufficient for them simply to cite the the existence of the collective bargaining agreement.

c. American Warehousemen's Association

The AWA argues that the Presiding Officer's standard of proof was too demanding, and that he was wrong to require that proof of injury must be as specific and convincing as if the Rules' opponents were seeking monetary damages from the carriers. The AWA further contends that the Presiding Officer was wrong to state that the three warehouse operators who testified during the proceedings had little credibility because they allegedly had failed to comply with a discovery request for their financial statements; AWA states that the witnesses did in fact provide their 1980 and 1981 statements. It also states that none of the discovery requests from the carriers and the ILA asked the warehousemen to specify the nature or extent of any harm caused them by the Rules.

d. National Customs Brokers and Forwarders Association of America

The NCBFAA argues that the Commission has never held that, in an investigation instituted by the agency, actual monetary damages must be proven to support findings of violations of sections 16 and 17. It submits that the historical standard properly applicable here is that parties challenging discriminatory or preferential practices arising out of provisions in carrier tariffs need only show that the potential exists for unreasonable discrimination or preference. NCBFAA contends that it had no knowledge at the outset of the proceeding that it would be required to meet the Presiding Officer's stringent test of quantified commercial harm, and that he acted unfairly in imposing that standard.

With respect to the issue of labor considerations, NCBFAA argues that carrier practices must be justified only by transportation considerations, that it is a false and ultimately unworkable

test to balance labor benefits against transportation harm, and that further it is unfair to require essentially local businesses such as NVO's or freight forwarders to overcome a labor practice of coastwide application on the basis of their own particular commercial damages.

e. American Trucking Associations

ATA argues that the opponents of the Rules adduced a *prima facie* case that the Rules are unreasonable, as the Presiding Officer acknowledged in the I.D. *See* I.D. at 60-61. It claims that the burden at that point should have shifted to the carriers and the ILA to show that the Rules were justified by transportation conditions or labor considerations. ATA contends that the Rules clearly are not justified by transportation conditions, and that the Presiding Officer's approach to weighing labor considerations was in error. It proposes a new test, whereby the benefits and burdens of the collective bargaining agreement to both sides are considered. This test would involve four parts:

1. The carriers/ILA would have to demonstrate that containerization in the port areas under investigation[47] has burdened or harmed the ILA through the loss of jobs or manhours;

2. The carriers/ILA would have to show that during January and February 1981, the period of record, the rules measurably benefited the ILA by bringing cargo to the piers;

3. The Rules' opponents would then have to demonstrate that they were measurably harmed by the Rules in January and February 1981; and

4. The Rules' opponents would have to demonstrate that they have not disproportionately benefited from containerization.

Under this test, ATA argues that the carriers/ILA failed to establish that containerization has harmed the ILA or that the Rules measurably benefited the ILA during January and

[47] Boston, New York, Baltimore, Hampton Roads/Norfolk, Charleston, Savannah, Jacksonville, Miami, Mobile, New Orleans, Houston and Galveston.

February 1981, that the Rules' opponents submitted both general and specific evidence of harm under the Rules, that persons within the 50-mile zone have not benefited disproportionately from containerization and that the Rules therefore should be found unlawful.

f. Hearing Counsel

Like ATA, Hearing Counsel also argue that the benefits to the ILA of the Rules first must be established and then balanced against the evidence of harm to the Rules' opponents; Hearing Counsel adapt for this purpose the "benefits/burdens" test established for adjudicating complaints against non-uniform assessment agreements under the MLAA. They contend that the Presiding Officer's treatment of labor considerations was erroneous because he did not require the carriers/ILA to prove that the Rules have benefited the ILA, and because he considered only evidence relating to the ILA's "worst case," New York, and failed to consider evidence that in other ports—Baltimore, Charleston, Hampton Roads and Savannah—ILA man-hours actually increased between 1967 and 1979. Hearing Counsel submit that the standard of proof advocated by the Presiding Officer failed to allow adequately for the short two-month period of record and the failure of many carriers to establish methods of identifying containers of cargo affected by the Rules. They contend that under an appropriate standard of proof, substantial harm to shippers, truckers and warehousemen from the Rules has been established.

3. *Replies to Exceptions*

a. Carriers/ILA

In replying to the Exceptions submitted by the Rules' opponents (including Hearing Counsel), the carriers and the ILA defend the test fashioned by the Presiding Officer for balancing the work preservation interests of the longshoremen against the harm done to off-pier business enterprises. His adaption of the *BSA* labor exemption criteria, they state, was consistent with the District of Columbia Circuit's *CONASA* decision, which they characterize as barring any determination that would find the Rules unlawful based solely on transportation considerations. They oppose the MLAA "benefits/burdens" approach because

they do not concede that the work preservation goals of the labor contract place a "burden" on cargo to which the Rules apply. They repeat their earlier assertion that the Rules reasonably restrict the benefits of container technology "to those situations where it performs a truly intermodal function." Reply to Exceptions at 12.

In response to the contention of the Rules' opponents that the carriers/ILA had failed to prove that longshoremen were harmed by containerization or that the Rules have been an effective remedy, they state:

> It hardly takes proof to establish that an innovation which increases productivity by 600% . . . causes a loss of jobs. More fundamentally, it is self-evident that, when a container is stuffed or stripped at an inland site, the work of stuffing or stripping that container is lost by longshoremen at the piers.
>
> The same truism disposes of proponents' contention that the Respondents must prove that the Rules bring work back to the piers. The Rules require that containers be stuffed or stripped by longshoremen. Each container that longshoremen stuff or strip means work for the longshoremen that they would not have had if the container were stuffed/stripped away from the piers.*
>
> * Proponents' juggling of statistics in an attempt to show that the Rules did not bring work back to the piers during the 1981 implementation disregards this simple fact.

Reply to Exceptions at 14.

The carriers/ILA continue to assert that the Rules' opponents had failed to show any harmful consequences to their businesses. They state that during the discovery process, only 30 companies made an initial claim of harm and subsequently failed to come forward with any probative documentation. They submit that the testimony from NVO's consisted mainly of a recitation of harm they inflicted on themselves by efforts to avoid on-pier handling—such as leasing of containers—and that many of the other services performed by NVO's could be performed separate from the actual loading of the container. They criticize

the testimony from freight forwarders that the Rules required them to pay for the cost of ILA handling, on the ground that the forwarders "never articulated what that cost meant to their businesses." Reply to Exceptions at 19. They argue that the evidence of two specific instances where warehousemen lost business because of the Rules was not credible or represented a unique situation not applicable elsewhere. They further contend that there is no evidence that the Rules will harm consolidators by causing shippers either to perform stuffing and stripping at their own facilities or to shift their patronage beyond the 50-mile limit. Finally, they state that there is no basis for the opponents' claim that they had no warning that they would be required to prove specific financial harm.

The carriers and the ILA acknowledge that the Presiding Officer never indicated in his Initial Decision how harm to off-pier enterprises should be balanced against the benefits to the union, which they state was "[c]onsistent with sound judicial practice"because it was unnecessary to his decision. Reply to Exceptions at 25. They also note that the Presiding Officer did not state what kind of injury from the Rules would have to be shown before his balancing test would be triggered. They suggest that such evidence should concern whether the Rules unreasonably reduced the off-pier enterprises' profits and whether any such effects were on an industry-wide scale.

b. National Customs Brokers and Forwarders Association of Ameriea

The Replies by the Rules' opponents to the protective Exceptions filed by the carriers and the ILA were very brief and need not be summarized here. The NCB FAA continues to insist that any test that involves the weighing of labor factors against shipping concerns is fatally flawed and that labor policy may not serve as an affirmative defense to shipping law violations. It argues that the MLAA assessment agreement "benefits/burdens" test advocated by Hearing Counsel and other parties involves the weighing of benefits to shippers of a particular service against the charge assessed against that service, and that that process is not adaptable to weighing shipping burdens against labor benefits.

IV. *Discussion*

A. *The Issue of "Labor Considerations"*

The passage of the Maritime Labor Agreements Act in 1980 cleared away the confusion that had existed previously regarding the application of "labor considerations" in FMC adjudications. the MLAA drew a bright line between the labor laws and the shipping laws and enjoined the Commission to regulate practices within its jurisdiction under Shipping Act standards, even if those practices are related to a collective bargaining agreement. The only question remaining is whether any of the post-MLAA developments altered Congress' instructions to the FMC. Clearly, the 1983-85 litigation under the labor laws, culminating in *NLRB* v. *ILA (II)*, had no such effect. The NLRB administrative law judge specifically refused to weigh shipping law considerations in reviewing the Rules under the Nationai Labor Relations Act. The Fourth Circuit and the Supreme Court both stated that effects of the Rules on persons outside the collective bargaining process—which is the focus of this investigation—are irrelevant to labor law analysis. Thus these decisions reinforced, in a sense, the methodology established by the MLAA. The NLRB, the labor agency, judged the Rules by labor law standards, and the FMC, the shipping agency, will judge the Rules by shipping law standards.[48]

The other development that must be considered is the District of Columbia Circuit's 1982 decision in *CONASA*. The carriers and the ILA have characterized the court's remand of the Commission's *Sea-Land* decision and its subsequent "Supplemental Opinion Following Remand" as follows:

> The court of appeals has clearly indicted what may not be done. National labor policy may not be disregarded in its entirety, nor may it be relegated to the status of an affirmative defense to the "indefensible." What must be done is clear form the court's refusal to countenance what

[48] As previously noted, the relatively narrow focus of the decisions by the NLRB, the Fourth Circuit and the Supreme Court on the stripping and stuffing provisions of the Rules created no basis for according "labor considerations" to the other enforcement provisions, such as the denial of containers to consolidators.

> the Commission had done. The shipping statutes outlaw unreasonable practices and unjust and undue discrimination. The Commission must take labor matters into account initially in deciding whether the practices prescribed by the collective bargaining agreement are in actuality unjust, unreasonable or undue.
>
> The court of appeals did not remand [*Sea-Land*] to have the Commission retrace its steps along a one-way street to a predetermined end. It mandated a genuine analysis in which the labor factors would be given more than mere lip service. These labor factors must be considered as an integral part of the equation. They have joined the ranks of traditional transportation considerations which in their aggregate and interplay determine reasonableness. They are not a license for unlawful practices, but rather important elements in determining whether these practices are just and reasonable so as not to be unlawful at all.

Respondents' Brief at 12 (attached to Respondents' Exceptions).

Even allowing for advocate's license, these characterizations are remarkable for their lack of foundation. The court's opinion did not "clearly indicate" any of the things the carriers and the ILA say it did. The Presiding Officer also interpreted the court's actions as an indication that it was "unhappy" with *Sea-Land*, but he candidly admitted that the court did not give "even the slightest hint" of the source of its putative unhappiness. I.D. at 33. It is far more reasonable to infer instead that the court wished to suspend any final conclusions regarding the lawfulness of the Rules under the shipping statutes until the less complex issue of their lawfulness under the labor laws had been resolved. Given the Rules' origin in a collective bargaining agreement, the logic of such a course of action is readily perceived. At the time of *CONASA*, the Rules were pending before the NLRB following the Supreme Court's remand in *NLRB* v. *ILA (I)*, and were not in effect as a result of the injunction obtained by the NLRB at the end of February 1981. It is sensible to surmise that the District of Columbia Circuit wanted the labor litigation to run its course before the Commission reached a final determination regarding the

merits of the Rules,particularly since the result of the NLRB proceedings might have removed, in whole or in part, the necessity for any Commission decision.

In any event, it is incontestable that, as a matter of law, *CONASA* did not bind the Commission to any method of analysis or decisional result in either the *Sea-Land* proceeding or in this investigation. It also must be remembered that the District of Columbia Circuit did not have before it in *CONASA* the Commission's analysis of the MLAA's meaning and importance regarding the substantive role of labor considerations in Shipping Act adjudications. The Commission's *Sea-Land* decision was issued two years before the MLAA was enacted and the subsequent proceedings before the court were confined, by choice of CONASA and NYSA, to the statute's significance regarding questions of jurisdiction. By staying proceedings in *Sea-Land* until this investigation was completed, the court intended that the Commission's deliberations herein might "shed further light on the shipping law issues involved" in *Sea-land.* 21 S.R.R. 1057, 1058. Our analysis of the MLAA set forth in this report is consistent with the court's purposes and reinforces the result of *Sea-Land.*

The Commission's conclusion that we should exclude labor considerations from our Shipping Act deliberations is supported by a number of truck and rail cases decided under the Interstate Commerce Act. In *Galveston Truck Line Corporation* v. *Ada Motor Lines, Inc.*, 73 M.C.C. 617 (1957), Galveston Truck Line, which was not unionized, was requested by the Teamster's union to enter into a labor agreement. When Galveston refused, officials of the union advised unionized motor carriers in the Oklahoma City area that the union was striking Galveston and that they should not handle any of Galveston's cargo. Although the union did not immediately picket Galveston, Galveston was unable to induce any Oklahoma City motor carrier to accept its interline shipments for approximately a six-week period.

Galveston filed a complaint with the Interstate Commerce Commission ("ICC"), alleging that the Oklahoma City carriers were in violation of former section 216 of the Interstate Commerce Act, which required motor carriers to accept and trans-

port all freight offered to them in accordance with their tariffs. In its decision, the ICC stated that a carrier's duty to accept and transport without discrimination all freight offered is almost "absolute" and may only be excused where the carrier is prevented from carrying out its duty by circumstances beyond its control. 73 M.C.C. at 626-27. The ICC observed that there were no strikes or picket lines that would have prevented the motor carriers from accepting Galveston's shipments.

The Oklahoma City carriers defended their refusal to serve Galveston on the grounds that, by acceding to the union's demands, they were able to avoid a strike that would have prevented them from serving other shippers. The ICC rejected this contention, stating:

> Certainly, it may not be assumed that any resistance [sic] on the part of defendants to becoming the media through which the objectives of the union were to be accomplished would have provoked a general strike against their entire operations. In any event, if common carriers should be confronted with this dilemma their obligation to continue to render service to all without undue discrimination must be regarded as paramount.

73 M.C.C. at 628. The ICC pointed out that to hold otherwise would "substitute for the regulation of interstate common carriers now vested in this Commission an indirect control by labor organization." *Id.* at *629.*

Other cases established that the obligation of common carriers to provide service for all indiscriminately was not removed by "hot cargo" clauses in collective bargaining agreements. *E.g., United Brotherhood of Carpenters and Joiners of America* v. *NLRB,* 357 U.S. 93, 109-111 (1958); *Merchandise Warehouse Co.* v. *A.B.C. Freight Forwarding Corporation,* 165 F.Supp. 67, 74-75 (S.D. Ind. 1958). Even "peaceful picket lines coupled with union contractual provisions acquiesced in by the carriers" has been held not to excuse the carriers' statutory obligations or to allow interference with the rights of persons not parties to a collective bargaining agreement. *Pickup and Delivery Restrictions, California, Rail,* 303 I.C.C. 579, 594 (1958). A common carrier must do "everything in its power to fulfill its obliga-

tions to the public" and is excused only if it is "prevented from so doing by circumstances clearly beyond its control . . . ." *Quality Drug Stores, Inc.* v. *Eastern Freight Ways, Inc.*, 123 M.C.C. 198, 202 (1975). Such circumstances do not include a collective bargaining agreement; the carrier instead must "insist upon contractual terms with the Union that will permit [it] to fulfill [its] duties" as a common carrier. *Merchandise Warehouse Company, supra*, 165 F.Supp. at 76.

The Presiding Officer acknowledged these decisions but held that the principles drawn from them "are either so general as to be virtually valueless or they are specific instances of particular conduct found unlawful under other statutes of law [sic] which are not really analogous to the Shipping Act." I.D. at 39. However, the lesson of these decisions is not that they involve statutes whose provisions precisely coincide with the Shipping Acts,[48] but that they consistently show that common carriers in other transportation modes have not been excused from their statutory obligations on the basis of collective bargaining agreements with their employees. The carriers and the ILA have not cited a single case in which a common carrier was permitted to interpose its collective bargaining obligations between the public and its statutory duties. Moreover, as we shall discuss below, the Shipping Acts impose duties on carriers that can be characterized as "absolute" in the *Galveston Truck* sense. *Galveston* and the other cases show that a common carrier may not bargain away such duties in a labor agreement and then defend its actions on the grounds that it served a greater public interest by avoiding a strike and preserving "labor peace."

For similar reasons, we reject the arguments of the carriers and the ILA that their collective bargaining agreement and labor peace on the docks should be considered together with "traditional" transportation factors in determining whether the Rules are reasonable under the Shippings Acts. There is no basis in law

[48] In fact, *Galveston Truck* found violations of the requirements in section 216 (b) of the Interest Commerce Act that carriers must observe just and reasonable practices, 73 M.C.C. at 630, similar to sections 17 and 18 (a) of the 1916 Act and Section 4 of the Intercoastal Act. *Merchandise Warehouse Co.* involved section 216 (d), the original model for section 16 first of the 1916 Act and sections 10(b) (11)-(12) of the 1984 Act. 165 F.Supp. at 74.

or logic for equating a carrier's voluntary consent to a labor contract with its employees, whereby it agrees to place certain discriminations and burdens upon shippers and other persons, with recognized transportation conditions that can render an outwardly discriminatory or burdensome practice reasonable, such as peculiarities in the nature or transportation needs of the cargo, competition from other carriers, insufficient cargo to warrant direct service at a particular port, or conditions at a port or other facility that truly are beyond the carrier's control. *E.g., Pacific Westbound Conference-Equalization and absorption Rules and Practices*, ___ F.M.C. ___, 22 S.R.R. 946 (1984); *North Atlantic Mediterranean Freight Conference — Rates on Household Goods*, 11 F.M.C. 202, 210 (1967); *American Manufacturing Co.* v. *Director General*, 77 I.C.C. 52 (1922). The Commission cannot agree to a methodology that would permit the carriers to bargain with the union without any incentive to safeguard their fundamental common carrier obligations.

Notwithstanding the contrary arguments of the carriers and the ILA, the result indeed would be a license to the carriers for unlawful practices because, judging from their pleadings in this proceeding, such practices always would be shielded from Shipping Act remedies by bulwark of "labor peace."

None of the other methods proposed by the Presiding Officer and the parties for incorporating labor factors into the Shipping Act are convincing or feasible. As we have stated, the general intention of the MLAA was that the Commission should return to its traditional role of interpreting the Shipping Acts, as applied to the persons and commercial activities covered by the Acts, and that the FMC should refrain from making findings of fact and conclusions of law about such labor matters as whether a particular item of agreement was a mandatory subject of collective bargaining. The Commission embarked upon that practice only as a result of *Volkeswagen*, and each succeeding case, *BSA*, *NYSA* and *PMA*, required detailed analysis from the FMC of labor law decisions and collective bargaining agreement provisions. By enacting the MLAA, Congress intended to put a halt to the process and to henceforth reserve labor law issues to the NLRB. The adoption by the Commission of any of the various tests proposed by the Presiding Officer and the parties would be

contrary to the policies underlying the MLAA, because they would require us to return once again to making findings of fact regarding the collective bargaining process and to rendering interpretations of the National Labor Relations Act.

The Presiding Officer proposed that the *BSA* labor exemption criteria be revived. These criteria would require the Commission to make findings as to whether collective bargaining claimed to justify a carrier's practice "was in good faith over a matter of legitimate concern to the union and not tainted by a conspiracy between labor and management . . . ." I.D. at 44. This methodology obviously would involve the kinds of investigations that the Commission engaged in before the MLAA. A revival of *BSA* would conflict with the MLAA in that *BSA* concerned the extent of Commission jurisdiction over labor-related shipping activities, and Congress itself resolved that issue when it enacted the MLAA.[∞]

The Presiding Officer's specific application of the *BSA* test was seriously flawed on its own terms. He analyzed the Rules on Containers in a three-stage process:

> The inquiry almost has to begin with the question of whether the particular activity is, in fact, unreasonable, prejudicial or discriminatory. If it is, the next question becomes whether the activity is justified by any of the traditional transportation factors held to excuse the activity. If such factors are not present, then the activity can be found

[∞] As we have discussed above, the carriers and the ILA previously argued in this proceeding that, even if the Rules on Containers fall within the MLAA's tariff provision, they nevertheless should be exempted from Commission jurisdiction under the *BSA* standards. In the February, 1982, Interim Report and Order, the Commission rejected that argument by applying the *BSA* criteria and finding that the Rules were ineligible for an exemption because they are imposed on outside parties. 21 S.R.R. 544, 556-57. While the carriers and the ILA did not raise any jurisdiction arguments in their Exceptions to the I.D., they indicate that they are reserving such arguments "for litigation at a later time." (Reply to Exceptions at 4, n. 4). That being the case, the Commission states here by way of clarification that, as Commissioner Moakley argued in his concurring opinion in the Interim Report, the MLAA nullified the *BSA* nonstatutory exemption and the jurisdictional inquiry ends once it is found that the Rules on Containers must be published in the carriers' tariffs and therefore fall within the MLAA's tariff matter provision. 21 S.R.R. at 563.

> unreasonable, *unduly* prejudicial or *unjustly* discriminatory and violative of the Act, unless the activity is said to be excused by labor considerations, i.e., is the result of a collective bargaining agreement.

I.D. at 48 (emphasis in original).

The Presiding Officer found from the face of the Rules that they were, in fact, prejudicial and discriminatory. Next, he found that there were no transportation factors that justified the prejudice and discrimination. Accordingly, he concluded that the Rules would violate the Shipping Acts in a "traditional" Shipping Act case. However, at this point, the Presiding Officer departed from Shipping Act analysis in order to account for "labor considerations." He did so by transmuting the third *BSA* criterion, that the collective bargaining agreement should not impose its terms on outside parties, into a requirement that the NVO's and consolidators must prove that they have been harmed by the Rules and if that burden is met, such harm must be weighed against the labor benefits brought about by the collective bargaining agreement.

The Presiding Officer acknowledged that he was proposing an unprecedented use of the third *BSA* criterion, *i.e.*, that it be employed to determine the lawfulness of a practice under the substantive prohibitions of the Shipping Acts, "a purpose . . . somewhat different from it's role in determining labor exemptions." I.D. at 45. However, he did not acknowledge that his interpretation of the criterion also was radically new. The evolution of that standard in both the antitrust labor exemption cases and the Commission's decisions consistently shows that whether a particular labor agreement met the standard's requirements turned only on the text of the agreement's provisions and not on the degree of actual harm (if any) suffered by outside parties. In *NYSA*, the Commission denied a labor exemption to the assessment agreement before it because carriers not members of NYSA were required, as a condition of receiving terminal services at the Port of New York, to sign an agreement levying assessments in accordance with the assessment formula under investigation. There was no issue regarding the actual or potential economic harm suffered by non-member carriers as a result

of the assessment agreement. Similarly, in *PMA*, there was no issue regarding the harm that would be suffered by non-member ports forced to comply with the various conditions for using PMA-ILWU joint hiring halls. Perhaps most significant, the application to the Rules on Containers of the third *BSA* criterion, in its traditional interpretation, already has been settled by the District of Columbia Circuit, which ruled in *CONASA* that the Rules are imposed on outside parties and were not eligible for a labor exemption. 672 F.2d at 187-88. Thus, the carriers and the ILA are incorrect to defend the Presiding Officer's test as consistent with *CONASA*. On the contrary, his test is directly inconsistent with *CONASA*.

The Presiding Officer was aware that his standard of proof with its emphasis on injury was at odds with Commission cases (discussed below) holding that in the absence of a claim for reparations, proof of harm is not a necessary element in a case of unjust discrimination or prejudice. But he dismissed the problem, stating:

> Whether harm is an essential element of the traditional case of discrimination where only transportation factors are involved is not the question presented here.

I.D. at 50. Instead, he recast the issue as follows:

> [T]he problem is whether harm can be an element of the labor policy considerations proffered in defense of practices challenged under the shipping laws. I am aware of no generally accepted tenet of law or of any precedent which would preclude its inclusion.

Id.

This method of analysis placed a greater burden on the NVO's and other persons opposed to the Rules than they would have borne in a "traditional" case of unjust discrimination or undue prejudice brought under the Shipping Acts. However, the Commission has concluded that this proceeding in fact must and should be adjudicated as a "traditional" case, based only on transportation factors. Because the Presiding Officer's test conflicts with both the will of Congress and with established court and Commission precedent, its adoption would be unwarranted

and unfair to persons whom the maritime statutes seek to protect.

Hearing Counsel, joined by the American Trucking Associations, would have the Commission measure "labor benefits" by adopting the "benefits vs. burdens" test from proceedings involving assessment agreements under the MLAA. As applied by those parties, this test would require us to second-guess the inclusion of the Rules in the collective bargaining agreement by determining whether the decline in man-hours suffered by the ILA at particular ports in fact was caused primarily by containerization, or by other factors such as declining market shares. The test also would require the Commission to determine whether the Rules in fact have succeeded in returning work to the piers, by measuring man-hours at various ports subsequent to the Rules' implementation. The Presiding Officer's test presumably also would have required the latter determination or something similar to it, although he did not reach that point in his analysis.

As with the *BSA* test, the adoption of this test would require the Commission to make findings of fact outside its area of expertise and to engage in investigations contrary to the policies of the MLAA. The application of the test in the area intended by Congress, *i.e.*, in complaints against non-uniform assessment agreements, in contrast requires only findings under the Shipping Acts regarding the fairness of particular assessments against ports or cargoes. *E.g., Boston Shipping Association* v. *FMC*, 706 F.2d 1231 (1st Cir. 1983).

Finally, and perhaps most important, there are important policy consideration that militate against the Commission's attempting to weigh labor considerations. The cases and legislation summarized in this decision illustrate how the national policies and purposes underlying the Shipping Acts differ fundamentally from the policies underlying the National Labor Relations Act. As the District of Columbia Circuit said in *CONASA*, the labor laws "[do] not answer the questions the FMC is required to ask-do the Rules unduly discriminate against certain shippers, and are they unjust and unreasonable?" 672 F.2d at 181. The Supreme Court's decisions on the Rules made it clear that any harmful effect on shippers and consolidators is irrelevant to the Rules' va-

lidity under the labor laws. In contrast, the Shipping Acts exist in large measure to protect shippers and other persons from unreasonable or discriminatory carrier practices. [61] The District of Columbia Circuit has described discriminatory tariffs as "a primary concern" of the Shipping Acts. *Pacific Maritime Association* v. *FMC*, 543 F. 2d 395, 409. The Commission cannot provide prophylactic protection against labor-related tariffs such as the Rules by controlling or influencing the agreement-filing process because, as a result of the MLAA, we no longer have jurisdiction over the carriers' collective bargaining activities. The application of the Shipping Acts can come only after such practices are *fait accompli*. Given that fact, additional deference to labor policy by the Commission in its post-implementation application of the Shipping Acts to the Rules could well result, as Judge MacKinnon pointed out in *CONASA*, in the effective removal of any protection for shippers who are being forced to bear the costs of the carriers' concessions at the collective bargaining table. 672 F.2d at 191.

The elemental differences between the national policies represented by the Shipping Acts and the labor laws become starkly apparent when consideration is given to trying to do what the Presiding Officer and the carriers/ILA avoided doing, that is , actually balance the labor benefits (however defined) brought about by the Rules against harm caused to shippers and other persons. In its Exceptions and Reply to Exceptions, NCB FAA and advanced persuasive arguments that any comparison of labor benefits and Shipping Act harm is at bottom an illogical and intellectually untenable exercise. We find NCB FAA's analysis compelling, and adopt it as our own:

> The test requires Proponents to show measurable harm, that is, dollars and cents figures from their books and records. The ALJ offers no guidance whatsoever as to what figures must be offered to qualify as "measurable harm" nor does he suggest which Proponents or how many Proponents must offer such evidence. Most importantly, he does not

[61] "The primary purpose of the shipping laws administered by the FMC is to protect the shipping industry's customers, not members of the industry." *Boston Shipping Association* v. *FMC*, 706 F.2d at 1238.

> state when or how under his test the harm demonstrated by Proponents will be sufficient to outweigh "labor policy . . . ." Exactly how many dollars of lost business or productivity or increased costs must be shown? And how many jobs must Respondents show were regained by the rules to be "balanced" against the dollar harm? Is the measure of proof of dollar loss the same for exporters as for importers? If Respondents must show a gain in employment, which they failed to do, is such gain to be measured against exporters' or importers' losses, or the losses of a port . . . ? To these crucial questions, the test has no answer.

NCBFAA Exceptions at 21.

> Amidst the multitude of issues raised (but not resolved) by the test, there exist two essential unanswerable questions. First, what specific amount of harm is required to invalidate the Rules? Second, how can Proponents be expected to gather the evidence of actual adverse impact? An examination of several specific scenarios demonstrates the utterly impossible task the Commission will be required to perform if it adopts the ALJ's balance of interests test. Suppose a New York exporter, in response to the Rules on Containers, decides to mini-bridge its cargo to the West Coast paying $350 more per shipment than an all water route available from the Port of New York. How can Proponents possibly canvass all mini-bridge exporters to develop this evidence for use in this proceeding?
>
> In the case of importers who are forced under the Rules to keep their cargo at a public warehouse for 30 days, how can Proponents gather evidence of the total increased interest cost incurred? In truth, it is virtually impossible for Proponents, even if they had had notice of the existence of a balance of interests test, to obtain any total dollars and cents figures on harm. Even if they could, what is the proper test period? Is it the all too short two months involved herein, or should it be a year or more?
>
> Suppose, however, that Proponents accomplish the impossible. Assume that Proponents could affirmatively establish that the Rules result in overall damage to United

> States East and Gulf Coast shipping amounting to $250,000,000 over a one-year period. Will such a showing outweigh the purported labor justifications (which Respondents never articulated in this docket)? Assuming that the ILA can demonstrate that it gained, say, 500 longshore jobs along the coast from Maine to Texas, would these extra longshoremen "outweigh" damages of $250,000,000? Or, should the figure be 1,000 or 5,000 new ILA jobs? How can the Commission ever hope to compare apples and oranges?
>
> Suppose the port of New York could establish dollar harm that in some way outweighs labor gains, but the port of Savannah could not. Would the ALJ's balance of interest test result in a finding that the Rules are unlawful in New York but lawful in Savannah? The ALJ's test does not, and indeed cannot provide an answer. Adoption of any type of test which requires the Commission to compare inherently unlike factors, such as labor gains against shipping losses, is totally unworkable. And it is not enough merely to say that the test has been inaccurately applied. *It is the test itself which is fundamentally flawed.*

Reply to Exceptions at 11-13 (emphasis in original).

It is fundamental that the Commission always should attempt to reconcile conflicting federal statutes in a manner that gives effect to both. However, because it is clear that the National Labor Relations Act does not apply to the case before the Commission in either its terms or its underlying policies, there exists only, to borrow from conflicts of law terminology, a "false conflict" that the FMC is not obliged to resolve by attempting to blend the two bodies of law.[52] *See United Brotherhood of Carpenters and Joiners of America* v. *NLRB*, 357 U.S. 93, 109-111 (1958). For all the reasons set forth above, we are convinced that there is no reasonable or feasible methodology by which we can seek to accommodate "labor interests" without abandoning our funda-

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[52] *See* Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 Duke L.J. 171. The author suggests that, in cases of "true conflicts" that cannot be resolved by restrained interpretations of the disaccordant statutes, the deciding forum should resolve the case before it by fully applying its own law and the underlying conflict, in a democracy, should be resolved through the political process and not by the courts. *Id.* at 176.

mental Shipping Act obligations. The Rules on Containers, in their manifestation as common carrier tariffs, will be judged according to Shipping Act standards normally applicable to such tariffs.

Having so concluded, the Commission will apply labor factors in devising any sanctions against the Rules, under the guidance of *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156 (1962). In *Burlington,* the ICC found that a union-induced secondary boycott had caused serious inadequacies in the trucking services available in the particular area and accordingly granted operating authority to a new company. The Supreme Court remanded the case because the ICC had not justified adequately its choice of remedy and had given no explanation why available remedies other than a new service were not sufficient. The Court directed that in the remand proceedings, the ICC should be careful in its choice of remedy so as to avoid unnecessary disruption of the collective bargaining process and that the remedy chosen should be "precise and narrowly drawn . . . ." *Id.* at 173-74. The Commission will apply similar principles to its choice of remedy in this proceeding.

B. *Application of the Shipping Acts to the Rules on Containers*

Because the Commission has concluded that "labor considerations" should not affect our examination of the Rules on Containers, it may be useful at this point to recapitulate the essence of the Rules considered only as ocean carrier tariffs.

> [A] tariff is in essence a statement by the carrier to possible shippers that it will furnish certain services under certain conditions for a certain price and once it has become legally promugated, it is binding upon both the carrier and any shipper taking advantage of it, and its terms (in essence) become in such respects the only contract between the two allowed by law . . . .

Union Pacific Railroad Co. v. *Higgins,* 223 F.Supp. 396, 401 (D.N.D. 1963).

The Commission has before it ocean common carrier tariffs that announce to shippers, consolidators, warehousemen and

freight forwarders that all containers loaded with cargo (other than mail, used household goods or personal effects of military personnel) coming from or destined to points within 50 miles of any ILA port along the Atlantic and Gulf Coasts must be loaded and unloaded in the first instance at pier facilities. Containers of export cargo arriving at the piers already loaded in contravention of this requirement must be stripped and restuffed by ILA members. Exceptions are made for those containers that hold solely (1) export cargo of a single manufacturer or other single shipper, but only if the cargo has been loaded by the shipper's employees at its own facility, or (2) import cargo owned by a single consignee, but only if such cargo is to be unloaded at the consignee's facilities by its own employees or stored in a public warehouse for 30 days at normal warehousing fees. The tariffs in addition deny the carriers' containers to any consolidator or deconsolidator, *i.e.*, anyone loading or unloading for hire the cargo of more than one shipper or consignee into or out of a single container.

Consolidators are usually non-vessel-operating common carriers (NVO's). In addition, ocean freight forwarders and warehousemen often offer NVO services as part of an integrated full-service operation. NVO's gather the cargoes of shippers (usually exporters), accept legal responsibility for the cargo and issue bills of lading to the original shippers; thus, to the shippers it serves, an NVO is a common carrier. The NVO then ships the cargo in its own name with a vessel-operating ocean carrier; thus, the NVO is a shipper in its relation with the vessel operator. NVO operations became widespread after the emergence of containerization and the development of certain related carrier practices. These practices included the carriers' making their containers freely available to NVO's, their payment of special consolidation allowances and their promulgation of Freight All Kinds ("FAK") rates. The FAK rate applies when the goods of more than one shipper are carried in one container as a single unit, and it results in a lower single rate on the whole than the total freight charges would have been on the individual shipments. The NVO's take their profit from the margin created by the FAK rate. The carriers encouraged the development of NVO's because they thereby obtained cargo from smaller shippers who otherwise might not be able to participate in maritime

commerce. The benefits of NVO's to smaller shippers, carriers and the commerce of the United States has long been recognized by Congress, the courts and the Commission. S. Rep. No. 3, 98th Cong., 1st Sess. 20 (1983); *CONASA*, 672 F.2d at 188; *Cancellation - Consolidation Allowance Rule*, 20 F.M.C. 858, 867 (1978).

The following discussion concerns the application of sections 14 Fourth, 16 First, 17 and 18(a) of the 1916 Act, the corresponding sections of the 1984 Act,[53] and section 4 of the 1933 Act to the Rules on Containers provisions of the carriers' tariffs. The Commission does not decide herein the lawfulness under these statutes of carrier practices that may relate to or be consequences of the Rules, but that are not required by the Rules.[54] We decide only the lawfullness of the practices described in the Rules themselves.

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[53] Because they carry forward existing proscriptions from the 1916 Act, the application of these particular sections of the 1984 Act will not work a "manifest injustice" against the carriers or otherwise transgress the guidelines of *Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696 (1974).

[54] For example, Richard W. Lee, former chief executive officer and director of Dolphin Forwarding, testified that when the longshoremen at the pier stripped and restuffed two Dolphin containers, they repacked the cargo into four containers. Tr. 4/19/83 at 146. Allie McNeil, of D.D. Jones, testified that a carrier was unable to protect temperature-sensitive cargoes from freezing during stripping and stuffing. Ex. 6 at 13.

To the extent that these practices may constitute violations of the Shipping Acts, there is no effective remedy in this proceeding. Civil penalties are not available because the Interim Report and Order, served February 5, 1982, removed the assessment of civil penalties as an issue. The remaining remedy of a cease and desist order would not apply, because the allegations described above have not been shown to be part of an ongoing pattern that could be addressed in such an order. The only effective remedy appears to be a claim for reparations. However, reparations are available only in a complaint case, not a Commission investigation. *See Gillen's Sons Lighterage* v. *American Stevedores*, 12 F.M.C. 325 (1969).

Thus, allegations such as those described above must be pursued in a complaint proceeding. On January 15, 1981, the International Association of NVOCC's and individual persons filed a complaint against a number of ocean carriers and employer organizations, alleging that the implementation of the Rules on Containers violated the 1916 Act and seeking $25 million in reparations. Docket No. 81-5, *International Association of NVOCC's* v *Atlantic Container Line*. The case has been stayed pending completion of this proceeding.

At this juncture, some observations are in order regarding the testimony and other evidence brought forward by the off-pier enterprises that oppose the Rules. As we have noted, the Presiding Officer was critical of this evidence in his Initial Decision. However, it is clear that his analysis resulted from his conclusion of law that "labor considerations" required parties opposing the Rules to prove extensive and detailed financial harm. The Commission has found that the Presiding Officer erred, that "labor considerations" have no place in our adjudication and that any test requiring a balance of "labor considerations" against proof of financial harm is illogical, unworkable and unfair to persons affected by the Rules. Further, we discuss below extensive Commission precedent, acknowledged by the Presiding Officer, that in the absence of a claim for reparations, a showing of business harm is not necessary to a finding of unjust discrimination or unreasonable practices under the Shipping Acts.

Thus, the probative standard applied by the Presiding Officer was inappropriately harsh. Under the circumstances of this case, in which carriers publishing facially discriminatory and burdensome tariffs have not attempted to defend them by reference to transportation considerations, it is sufficient that the testimony supports and confirms the evidence provided by the text of the Rules themselves. The witnesses stated that they in fact were denied containers by the carriers, that they incurred additional costs as a result of stripping and restuffing of loaded containers, that business was lost to competitors outside the 50-mile zone and that their customers' shipments were delayed as a result of enforcement of the Rules. It was unnecessary that a showing be made by off-pier enterprises that the operation of the Rules reduced their profits, curtailed investment or turned their entire industry into an economic failure, as the carriers and the ILA would require.[55] Imposition of such a requirement would be particularly unreasonable in light of the fact that the Rules' opponents were testifying in the spring of 1983 about effects on their businesses from the Rules' two-month implementation more than two years before. That factor does not excuse testimony that

[55] Reply to Exceptions at 26.

is otherwise lacking,[58] but it does illustrate the incongruity of demand that the witnesses prove that the Rules would have ruined them financially. The Commission is not required to wait for such a state of affairs to take action, particularly since our role in this investigation is remedial, not punitive. *Dart Containerline Co., Ltd.* v. *FMC*, 639 F.2d 808, 817 (D.C. Cir. 1981); *General Investigation of Pickup and Delivery Rates and Practices in Puerto Rico*, 16 F.M.C. 344, 351 (1973); *Investigation of Rates in the Hong Kong-United States Atlantic and Gulf Trade*, 11 F.M.C. 168, 175 (1967).

It also should be stated that the breadth of the record in this proceeding clearly surpasses the evidence adduced in the Commission's *Sea-Land* investigation of the Rules as applied in the Puerto Rico trades, the sufficiency of which was not questioned by the District of Columbia Circuit in *CONASA*. The Commission's *Sea-Land* decision discussed testimony by three NVO's located in New York and San Juan. 21 F.M.C. at 24-25. This record contains evidence from NVO's (one of whom, Dolphin Forwarding, testified in *Sea-Land*), consolidators, warehousemen and freight forwarders operating in New York, Hampton Roads/Norfolk and Miami. Specific references to their testimony will be noted below where appropriate.

1. *Section 14 Fourth*

Section 14 Fourth of the 1916 Act prohibited a carrier from, *inter alia*, unfairly treating or unjustly discriminating against any "shipper" in the matter of "cargo space accommodations" or other "facilities." 46 U.S.C. app. § 813 (1982). That provision of section 14 Fourth was carried forward in section 10(b)(6)(C) of the 1984 Act, 46 U.S.C. app. § 1709(b)(6)(C), with one substantive change. Section 10(b)(6)(C) deletes the limiting words "against any shipper" from the prohibition. The carriers and the ILA argue strenuously that truckers, freight forwarders, warehousemen and customs brokers were not protected under the 1916 Act because they are not "shippers." It is not necessary to resolve that issue here, since reparations are not in issue and the only remedy

[58] For example, the witness for All Transport, Inc., an NVO and freight forwarder based in New York, appeared to lack personal knowledge regarding the impact of the Rules. 4/20/83 Tr. 20-70.

is a cease and desist order against current practices. We must decide only the general applicability of these particular statutes to the Rules on Containers.

The Rules do not address "cargo space accommodations." However, Rule 1(E), pursuant to the "Dublin Supplement," requires the denial of containers to NVO's and other consolidators. The term "facilities" as used in sections 14 Fourth and 10 (b) (6) (C) includes containers.[57] However, the carriers and the ILA argue that even if sections 14 Fourth and 10 (b) (6) (C) apply to the denial of containers, there is no violation because the statutes do not protect NVO's against this practice. They concede that an NVO may be a shipper in relation to the underlying carrier, but contend that whether an NVO can be considered a "shipper" for purposes of sections 14 Fourth and 10 (b) (6) (C) depends on the interest for which it seeks the container. They argue that when an NVO's interest in obtaining a container is for the purpose of loading or unloading cargo for hire, the NVO is not a "shipper" for purposes of the Shipping Acts. No authority is cited for this proposition.

An NVO is no less a shipper in its relationship with the underlying carrier because it is in the business of providing ocean transportation to its own customers. *See ICC* v. *Delaware, Lackawanna & Western Railroad Company*, 220 U.S. 235 (1911). This historical principle was approved and carried forward by Congress in defining "non-vessel-operating common carrier" in the 1984 Act. Section 3, 46 U.S.C. app. § 1702 (17), states that an NVO "is a shipper in its relationship with an ocean common carrier." In explaining the inclusion of this provision, the Senate Report stated:

> The shipper status of an NVO, in its relationship with the vessel operator, is intended to accord to NVOs the same protection as is accorded other shippers, such as the prohibition against unjust discrimination.

S. Rep. No. 3, 98th Cong., 1st Sess. 20 (1983). Clearly, an NVO is acting as a shipper in requesting a container from a

[57] The Commission so observed in *Sea-Land, supra*, 21 F.M.C. at 28. The ILA's own characterization of containers as extensions of the ship's hold would compel the conclusion that containers are cargo facilities.

vessel-operating carrier in order to load and tender the container. It is the relationship between shipper (NVO) and carrier that is evidenced by this transaction and the NVO is entitled, just as any other shipper, to the protection of both sections 14 Fourth and 10 (b) (6) (C) in this capacity.

The change brought about by section 10 (b) (6) (C) of the 1984 Act would appear to strengthen the argument that persons other than shippers may not be unfairly denied containers. The deletion of the specific limiting words during the legislative process[58] must be presumed to have been deliberate and meaningful.[59]

While we need not decide in this case the outer limits of the group entitled to protection under section 10 (b) (6) (C), it seems clear that such protection extends at least to those entities seeking containers on behalf of shippers. Thus, truckers, warehousemen, freight forwarders, customs brokers and non-NVO consolidators may not be unjustly discriminated against in the matter of cargo space accommodations or other facilities, to the extent that they are seeking and utilizing such accommodations or facilities as or on behalf of members of the shipping public. This relationship with common carriers is regulated by the 1984 Act.

The Rules deny containers, a cargo facility, to only one particular class of persons solely on the basis of the kind of work those people do (in which they compete with the ILA membership for cargo loading work). Because this denial is not based on transportation needs or conditions properly cognizable under the Shipping Acts, the Commission holds that this practice is unfair treatment and unjust discrimination against at least NVO's, in violation of section 14 Fourth of the 1916 Act, and against NVO's and others acting as or on behalf of shippers, in violation of section 10 (b) (6) (C) of the 1984 Act.

As discussed below in connection with section 16 First, there is no need to find that NVO's and consolidators being denied

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[58] *Compare* S. 47, 98th Cong., 1st Sess. § 12 (b) (6) (Mar. 1, 1983) (section 14 Fourth limitation to "shippers" retained) with H.R. 1878, 98th Cong., 1st Sess. § 9 (b) (6) (Oct. 17, 1983) (limitation to "shippers" deleted). *See* H.R. Rep. No. 600, 98th Cong., 2d Sess. 40 (1984) (conference adopts House version).

[59] *See* Sutherland Stat. Const. § 22.30 (4th Ed.).

containers are in competition with those receiving them, or that those being denied containers are suffering business harm requiring reparations. *See Flota Mercante Grancolombiana* v. *FMC*, 302 F.2d 887 (D.C. Cir. 1962); *United States Atlantic and Gulf-Puerto Rico Conference* v. *American Union Transport, Inc.*, 5 F.M.B. 171 (1956). The record here shows the existence and operation of facially unfair and discriminatory tariff provisions, which have not been defended or justified on the basis of transportation requirements or circumstances. That alone provides sufficient grounds for FMC action. In addition, there is testimony from consolidators and NVO's confirming that, in the two months the Rules were in effect during the period of record, they in fact were refused containers and thereby incurred increased costs and lost customers.[60]

2. *Section 16 First*

Section 16 First of the 1916 Act prohibited a carrier from subjecting "any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . ." 46 U.S.C. app. § 815 (1982). This provision has been carried forward in section 10 (b) (12) of the Shipping Act of 1984, 46 U.S.C. app. § 1709 (b) (12), which also outlaws "unreasonable refusals to deal." *Id.* The protections of the 1916 statute, being not limited to "shippers," extended more broadly than those of section 14 Fourth, and would cover, for example, warehousemen as well as NVO's.

In order to establish a violation of section 16 First in cases involving cargo rates, it is necessary to prove that the person, locality or description of traffic allegedly being subjected to a prejudicial or disadvantageous rate is "similarly situated" in transportation terms to persons, localities or descriptions of traffic who are not receiving such treatment. Alternatively, where the carrier is charging different rates on different commodities or for transportation between different points, the "similarly situated" desideratum usually translates into a requirement that the allegedly prejudiced person must be shown to be in competition with someone who uses the carrier's service but who is not receiving

[60] *E.g.*, Ex. 5 (Dolphin Forwarding); Ex. 6 (D.D. Jones Transfer & Warehouse Co.); Ex. 7 (Norfolk Warehouse Co.).

such treatment. *E.g., Assessment of Incheon Arbitrary—United States Import/Export Trades,* 21 F.M.C. 522, 524-25 (1978).

However, in cases involving not rates but a tariff provision or practice or an across-the-board fixed charge that applies on all cargo regardless of the commodity involved, the Commission consistently has not required a showing of a competitive relationship between the party alleging prejudice or discrimination and an allegedly preferred person.

For example, in *Valley Evaporating Co.* v. *Grace Line, Inc.*, 14 F.M.C. 16 (1970), as part of a tariff simplification program, a conference of carriers eliminated commodity rates for all commodities not meeting a specific volume requirement. In doing so, it inadvertently eliminated a commodity rate on dehydrated apples that were moving in sufficient quantities to be entitled to a commodity rate under the conference criteria. A shipper who was assessed the higher "Cargo N.O.S." rate for a shipment of dehydrated apples brought a complaint before the Commission alleging a violation of section 16 First. The complainant did not introduce any evidence that it competed with any other shippers, nor did it introduce any evidence regarding the extent to which its ability to compete was harmed by the conference's action. The Commission concluded that once the conference had established the volume criterion for the elimination of commodity rates, it was required to apply it "in a totally fair and impartial manner." *Id.* at 22. The Commission went on to state:

> At this point the single question involved was whether a given commodity moved in sufficient volume or not. Questions as to the characteristics inherent in the particular commodity involved were irrelevant as were questions of whether the particular commodity competed with any other commodity. Thus, as we stated in *Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525, 547 (1966), the equality of treatment required in situations of this kind is "absolute and not conditioned on such things as competition."

Id.

In connection with the issue of damages, the *Valley Evaporating* respondents pointed out that complainant's only showing

of injury was that it paid more dollars for the transportation of dehydrated apples than it would have if the commodity rate had applied. The Commission acknowledged that

> the existence of a "competitive relationship" between the preferred and the prejudiced shipper is an essential element of a violation involving alleged preferential or prejudicial rates or charges, [and] any award of reparation premised on such violation must take into consideration the "character, intensity, and effect" of this competitive relationship.
>
> * * *
>
> As we explained in *Agreement No. 8905—Port of Seattle and Alaska S.S. Co.*, 7 F.M.C. 792, 800 (1964), a case involving alleged "unlawful discrimination and prejudice" in tariff charges, "Past decisions of the Commission and its predecessors make clear that the person claiming illegal prejudice or disadvantage must establish damage *with respect to its ability to compete.*"

14 F.M.C. at 24 (emphasis in original). Nevertheless, the Commission found that this requirement should not apply where the carrier's duty to treat shippers equally was "absolute":

> However, we have already determined that the equality of treatment required here in this case is "absolute" and not conditioned on competition. Therefore, the "character, intensity, and effect" of competition becomes irrevlevant and the measure of damages simply becomes the difference between the rate charged and collected and the rate which would have applied but for the unlawful discrimination or prejudice.

Id. at 25.

A second case illustrating the same principle is *Free Time Practices—Port of San Diego*, 9 F.M.C. 525 (1966). The Commission there concluded that no competitive relationship among shippers need be shown because the provision of free port time for the loading or unloading of cargo bore no relationship to the character of the cargo—"it is extended to cargo on equal terms without regard to size, shape or any other characteristic inherent

in the particular cargo involved." 9 F.M.C. at 547. The Commission went on to state:

> The equality required in situations of this kind is absolute and is not conditioned on such things as competition, proximate cause and the like.

Id. See also *New York Foreign Freight Forwarders & Brokers Ass'n* v. *FMC*, 337 F.2d 289, 299 (2d Cir. 1964), *cert. den.*, 380 U.S. 910 (1965); *International Trade & Development, Inc.* v. *Sentinel Line*, 22 F.M.C. 231 (1979).

After acknowledging the principles established by these cases, the Presiding Officer correctly found that the application of the Rules on Containers applies generally and bears no relation to the character of the cargo itself. I.D. at 60. Thus, the presence or absence of competition between persons inside the zone, or between those inside the zone and those outside it, is irrelevant. In this connection, the Supreme Court's decision in *Volkswagen* provides additional support for the conclusion that the issues presented by the Rules on Containers do not require a showing of competition. 390 U.S. at 279-80, 293-94.

Once the complaining party makes out a prima facie case, it is up to the carrier to show that the prejudice is justified by some bona fide transportation requirement or condition. *North Atlantic Mediterranean Freight Conference—Rates on Household Goods*, 11 F.M.C. 202, 209-10 (1967), *modified on other grounds sub nom. American Export Isbrandtsen Lines, Inc.* v *FMC*, 409 F.2d 1258 (D.C. Cir. 1969).

The Rules permit all shippers and consignees located outside the 50-mile zone to have their cargo loading and unloading work performed by off-pier consolidation, warehousing and NVO companies, if they wish, without stuffing and stripping of their containers at the pier. However, inside the zone, employment of such companies by a shipper or consignee is conditioned upon the requirement that the cargo must be loaded into or unloaded out of the container only at the pier by ILA longshoremen; at least with respect to export cargo, this requirement is backed up by the threat of stripping and restuffing of any container arriving at the pier already loaded.

The Rules permit "qualified shippers" and "qualified consignees" within the 50-mile zone to avoid stripping and stuffing at the pier. However, in order to be "qualified," a shipper or consignee must have a "proprietary interest" in the cargo (other than in its transportation or physical consolidation or deconsolidation), and the loading or unloading must be done only at its own facility and only by its own employees. A shipper loading cargo within the 50-mile zone who does not have a "proprietary interest" in the cargo, *i.e.*, an NVO, cannot avoid stripping and stuffing at the pier. A shipper or consignee within the zone who *does* have a "propriety interest" in the cargo but who nevertheless is too small to have its own cargo facility and employees is denied the option of contracting such work to off-pier warehouses or deconsolidators and must use pier facilities (consignees are permitted the option of paying for 30 days of storage in a public warehouse). These various distinctions drawn by the Rules between persons inside and outside the zone, between owners of cargo and NVO's, between owners who have their own cargo facilities and those who do not and between importers who have a "warehouse exception" and exporters who do not have no relation to the type of cargo being moved and are not caused or justified by transportation circumstances or conditions. The Commission wishes particularly to address the differing treatment accorded to owners of cargo and NVO's. The Supreme Court's decision in *ICC* v. *Delaware, Lackawanna & Western Railroad Company, supra*, leaves no doubt that the mere ownership or non-ownership of cargo is not a transportation circumstance that can justify discrimination, preference or prejudice. Although *ICC* v. *Delaware Lackawanna* was decided over seventy-years ago, it is particularly relevant to the instant proceeding because it involved a company that was performing consolidation services much as NVO's do today.

In the 1870's and 1880's, railroads established a practice, similar to the ocean carriers' FAK rate, of charging less per unit of measure for carload shipments than for less-than-carload shipments. Entities known as forwarding agents (forwarders) began aggregating less-than-carload shipments tendered by various shippers in order to obtain the lower carload rates offered by the railroads. 220 U.S. at 243-44. However, in 1899, railroads serving

the "Official Classification" territory[61] began restricting the forwarders' ability to obtain a carload rate by combining different shipments in the same car. The restrictions were as follows:

> "Rule 5-B. In order to entitle a shipment to the carload rate, the quantity of freight requisite under the rules to secure such carload rate must be delivered at one receiving station, in one day, by one consignor, consigned to one consignee and destination, except that when freight is loaded in cars by consignor it will be subject to the car-service rules and charges of the forwarding railroad. (See note.)
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> * * *
>
> "Note. Rule 5-B will apply only when the consignor or consignee is the actual owner of the property.
>
> "Rule 15-E. Shipments of property combined into packages by forwarding agents claiming to act as consignors will only be accepted when the names of individual consignors and final consignees, as well as the character and contents of each package, are declared to the forwarding railroad agent, and such property will be waybilled as separate shipments and freight charged accordingly. (See note.)
>
> "Note. The term 'forwarding agents' referred to in this rule shall be construed to mean agents of actual consignors of the property, or any party interested in the combination of [L.]C.L. shipments of articles from several consignors at point of origin."

Id. at 246.

A complaint was filed with the ICC in 1907 by a forwarder who was charged a less-than-carload rate for merchandise belonging to several shippers that had been aggregated into three carloads. The ICC concluded that the railroads could not refuse to make carload rates available to forwarders while making them available to owners of the cargo. The railroads were ordered to cease and desist from applying the restrictions. A circuit court

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[61] The "Official Classification" territory encompassed the northeast part of the United States and extended west as far as Chicago.

set aside the order and the ICC appealed to the Supreme Court. The Supreme Court upheld the ICC's decision, stating:

> The contention that a carrier . . . can make the mere ownership of the goods the test of the duty to carry, or, what is equivalent, may discriminate in fixing the charge for carriage, not upon any difference inhering in the goods or in the cost of the service rendered in transporting them, but upon the mere circumstance that the shipper is or is not the real owner of the goods is so in conflict with the obvious and elementary duty resting upon a carrier, and so destructive of the rights of shippers as to demonstrate the unsoundness of the proposition by its mere statement. We say this because *it is impossible to conceive of any rational theory by which such a right could be justified consistently either with the duty of the carrier to transport or of the right of a shipper to demand transportation.*

220 U.S. at 252 (emphasis supplied). The principles enunciated in *ICC* v. *Delaware, Lackawanna* have remained fundamental transportation law over the subsequent 75 years. *E.g., American Trucking Associations, Inc.*v. *Atchison, Topeka, & Santa Fe Railway Co.*, 387 U.S. 397, 406, 407 (1967); *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.* v. *Acme Fast Freight, Inc.*, 336 U.S. 465, 476 (1949); *DHL Corporation* v. *CAB*, 659 F.2d 941, 946, n. 12 (9th Cir. 1981).

In sum, the Rules on Containers place restrictions on the ability of defined classes of shippers to utilize the full range of services offered by off-pier NVO's, consolidators, warehousemen and freight forwarders. These restrictions are not justified by transportation circumstances properly cognizable under the Shipping Acts and are arbitrary and unfair. The Commission holds that the Rules create unreasonable disadvantages to shippers within the 50-mile zone who wish to employ off-pier cargo facilities and to the companies operating such facilities, in violation of sections 16 First of the 1916 Act and section 10 (b) (12) of the 1984 Act.

As was the case in *ICC* v. *Delaware, Lackawanna, supra,* the undue preference and prejudice is established from the text of the Rules themselves and no extrinsic evidence is required. In the

absence of a claim for reparations, the extent of damage to the disadvantaged persons' revenues, profits or ability to compete is irrelevant. Nevertheless, the record shows beyond question that persons affected by the Rules suffered increased costs as a result of having to pay ILA labor charges that they otherwise would have avoided.[62] Southgate Trucking, a warehouse operator located within 50 miles of Hampton Roads, lost an account it had with Union Carbide when the Rules went into effect. Union Carbide transferred its business to a competitor of Southgate located outside the zone. When the Rules were enjoined at the end of February, 1981, Union Carbide returned to Southgate.[63] D.D. Jones Transfer and Warehouse Company, another warehouser/consolidator located within 50 miles of Hampton Roads, testified that some of its shipper customers delayed their shipments until after the Rules were enjoined. The carriers/ILA denounce such testimony as speculative and atypical (because the cargo allegedly was susceptible to moving through Richmond, a non-ILA port), but the testimony illustrates how the Rules place artificial restrictions on the free movement of cargo, on the ability of shippers to choose between pier-side versus off-pier cargo handling and on competition between off–pier enterprises.

For the same reasons, sections 16 First and 10 (b) (12) interdict the provision in the Rules forbidding carriers from making containers available off-pier to NVO's and other consolidators. NVO's are being denied containers, not on the basis of any Shipping Act transportation circumstances, but solely on the basis of their identity as consolidators or deconsolidators, while no such prohibition is brought to bear against "qualified shippers."

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[62] 4/19/83 Tr. at 86-96; Ex. 4; 4/19/83 Tr. at 109-10.

[63] Ex. 10, p. 8; 4/21/83 Tr. 15-17.

3. *Sections 17, second paragraph, and 18(a)*[84]

In *Free Time Practices—Port of San Diego, supra,* the Commission stated:

> Section 17 [second paragraph] requires that the practices [relating to or connected with receiving, handling, storing, or delivering property] be just and reasonable. "Reasonable" may mean or imply "just, proper," "ordinary or usual," "not immoderate or excessive," "equitable," or "fit and appropriate to the end in view." Black's Law Dictionary, Fourth Edition. It is by application to the particular situation or subject matter that words such as "reasonable" take on concrete and specific meaning.
>
> * * *
>
> The justness or reasonableness of a practice is not necessarily dependent upon the existence of actual preference, prejudice or discrimination. It may cause none of these but still be unreasonable. To conclude otherwise is to make the second portion of Section merely redundant of other sections of the Shipping Act, a result not readily ascribed to Congress.

9 F.M.C. at 547. The provisions of section 17, second paragraph, 46 U.S.C. § 816 (1982), have been carried forward without substantive change in section 10 (d) (1) of the 1984 Act, 46 U.S.C. app. § 1709 (d) (1). As the quotation above indicates, section 17 requires a flexible interpretation, and this is particularly appropriate given the unique circumstances presented by the Rules on Containers. *See Volkswagen, supra.* While it is not necessary to prove discrimination or preference in order to find a violation of section 17 (as the quotation above indicates), a practice that is unjustly discriminatory or preferential ineluctably will be unrea-

[84] Section 17, first paragraph, pertained only to the actual rates, fares and charges of carriers. Hearing Counsel contend that the Rules violate this statute because they effectively deny FAK rates to certain shippers and cargoes. Such circumstances could be a result of the operation of the Rules, but are not mandated by the text of the Rules themselves. As with the testimony mentioned in note 54, *supra,* such allegations are more appropriately the subject of a complaint proceeding. The Commission makes no findings regarding section 17, first paragraph, in this proceeding.

sonable as well. *See, e.g., Perry's Crane Service* v. *Port of Houston Authority,* 19 F.M.C. 548 (1977).

Section 18 (a) of the 1916 Act imposes a "just and reasonable" standard on the practices of carriers operating in the domestic offshore trades, 46 U.S.C. app. § 817 (a) (1982). A similar requirement applies through the provisions of sections 4 and 5 of the Intercoastal Act, 46 U.S.C. app. §§ 845a, 845b.

Because the Rules are unreasonably disadvantageous to certain classes of shippers and consignees and to off-pier enterprises that serve such shippers, in violation of sections 16 First and 10 (b) (12), they are unreasonable under these statutes as well. In addition, certain provisions of the Rules should be analyzed more specifically here. In *Sea-Land,* the Commission found that the stripping and restuffing of loaded containers was unreasonable under section 18 (a) of the 1916 Act and section 4 of the Intercoastal Act.[85] That enforcement mechanism is not based on or justified by any transportation need. No extrinsic evidence regarding actual harm is necessary. *See United States Lines, Inc.* v. *Maryland Port Administration,* __F.M.C. __, 20 S.R.R. 646, 649 (1980) ("[t]here is no legal precedent or logical premise for the notion that otherwise unreasonable tariff provisions are permissible if a user subjects itself to them and is making a profit in spite of their existence . . . . [T]he validity of the tariff must be adjudged as applied to any user, not merely on the basis of . . . particular parties' financial circumstances.").

Shippers having a "proprietary interest" in the cargo are excepted from having their cargo loaded or unloaded at the piers. As discussed above in connection with section 16 First, distinctions between shippers based on ownership of cargo are inconsistent with traditional common carrier obligations. The exception for "qualified" shippers placed the entire commercial burden imposed by the Rules on a single class of shippers within the 50-mile zone—the NVO's—and is unreasonable. *See Volkswagen, supra,* 390 U.S. at 281-82. The argument advanced by the carriers and the ILA that consolidators within the zone should bear the bur-

[85] Section 17 was not part of *Sea-Land* because the statute applied only in foreign commerce and *Sea-Land* involved only the Puerto Rican domestic offshore trades.

den of the Rules because they were responsible for displacing traditional ILA work may be a defense under the labor laws, but certainly is not under the Shipping Acts.

The prohibition against the furnishing of containers by carriers to all consolidators can be analyzed in similar fashion. The prohibition is intended to force cargo shipped by NVO's to be loaded or unloaded at the pier. Similar to the exception for shippers having a proprietary interest in the cargo, this prohibition is based on the identity of the shipper, which, under the Shipping Acts, is not a reasonable basis for discrimination. It is also clear that this particular provision of the Rules is the result of the union using the carriers as weapons against its competitors. Such motives cannot justify the cessation by the carriers of their longstanding practice of making their containers freely available to consolidators.

Finally, the Rules require that inbound cargo not destined to a consignee that (a) owns the cargo and (b) operates its own warehouse must be stripped at the piers unless it is stored at a public warehouse for 30 days prior to delivery. These requirements, which impose additional expense and delay on import cargo, are not necessitated by transportation conditions and are therefore unreasonable.[66] It also was unreasonable and discriminatory for the carriers to maintain a "warehouse exception" for import cargo but not for export cargo; as discussed in Part I, *supra*, the "warehouse exception" for export cargo was eliminated in 1975 in order to placate the ILA.

In sum, for the reasons set forth above, we find that these provisions of the Rules are excessive and unreasonable, and violative of sections 17 and 18(a) of the 1916 Act, section 4 of the Intercoastal Act and section 10 (d) (1) of the 1984 Act.

4. *Sections 10(c) (1)-(2) of the 1984 Act*

Section 10 (c) (1) of the 1984 Act bars concerted activity among two or more common carriers that results in "an unreasonable refusal to deal"; section 10 (c) (2) bars similar activity

[66] *E.g.*, Ex. 144 at 23-24, 27-29. The carriers respond by claiming that the importer could avoid any hardship by having his cargo stripped at the pier and delivered loose to him. Why should he, if he did not, for whatever commercial or economic reason, choose that method in the first place?

"that unreasonably restricts the use of intermodal services or technological innovations. . . ." 46 U.S.C. app. § 1709 (c) (1)-(2). Section 10 (c) was drafted to preserve the prohibitions of section 15 of the 1916 Act, 46 U.S.C. app. §814 (1982), against those activities that were considered abuses of concerted power. H.R. Rep. No. 53 (Part 1), 98th Cong., 1st Sess. 23-24 (1983); S. Rep. No. 3, 98th Cong., 1st Sess. 34-37 (1983). Because section 15, as previously enacted, is no longer in effect, Congress enacted section 10 (c) to codify and provide additional protection against abuses of concerted power previously provided through case law under the more general "public interest," "detrimental to commerce" and "unjust discrimination" standards of section 15.

Unlike the other sections of the 1984 Act already discussed, sections 10 (c) (1)-(2) have no antecedent in the 1916 Act provisions originally put in issue in this proceeding by the Commission's February 3, 1981, Order of Investigation. Section 15 was not included by that Order as one of the statutes possibly violated by the Rules on Containers. Under the circumstances, any finding now against the respondent carriers under sections 10 (c) (1)-(2) might transgress the carriers' due process rights to clear notice regarding the scope of the Commission's investigation.

V. *Conclusion*

The Commission long has recognized that the shipping laws of the United States should be interpreted so as to enable shippers to take full advantage of improved transportation techniques and services. Nearly a decade ago, the development of "landbridge" intermodal services, whereby shippers were offered a rail-water alternative to all-water service, was challenged by certain regional port interests. In denying the ports' complaint, the Commission stated:

> It would strain the interpretation of the Shipping Acts beyond credulity to conclude that they require the Federal Maritime Commission to destroy and prevent a significantly innovative development in the maritime commerce of the United States which redounds to the benefit of the shipper. * * * The public interest and the economy as a whole is

> enhanced anytime the public is offered an additional service which it may or may not utilize at its own discretion.
>
> The tide of events by which new and efficient operating modes come into existence cannot be held back by the dead hand of outmoded conventions.
>
> * * * The public interest cannot be perverted by precluding the utilization of more economically efficient and effective transportation modes and services.

Board of Commissioners of the Port of New Orleans v. *Seatrain International, S.A.*, 21 F.M.C. 147, 183 (1978) (footnotes omitted).

We now are asked to leave undisturbed tariff provisions that preclude certain shippers from fully utilizing off-pier containerization and consolidation services and require them to bring their cargo to the piers, as in the past, for loading and unloading by longshoremen. These artificial restrictions on containerization and intermodalism are defended by resort to the *post hoc* rationalization that they do not affect shippers who can "truly benefit" from such services. The Commission cannot accept this argument. In enacting the Shipping Act of 1984, Congress mandated that the new statute should be administered in a manner that "provide[s] an efficient and economic transportation system in the ocean commerce of the United States. . . ." 46 U.S.C. app. § 1701. Further, the legislative history of the 1984 Act demonstrates that Congress was keenly aware of the need to achieve all possible benefits of containerization, which depend upon the uninterrupted transport of a container between shipper and consignee. The Senate Report stated:

> In the late 1960's, the technical innovation of containerization made possible new economies of scale and thus promised the potential for substantial reduction in real costs to vessel operators and shippers. As a consequence, containerization became rapidly established on the most important U.S. trade routes. The full benefits of containerization can only be realized, however, when a container moves between shipper and consignee or between inland consolidation centers without breaking bulk. Under these circumstances, additional economies are derived from the speed with which intermodal transfer takes place, from savings in the labor

> and "storage" costs associated with this process, and from cost reductions in packaging and insurance as well as substantial reduction in damage and pilferage claims.

S. Rep. No. 3, 98th Cong., 1st Sess. 10 (1983) (footnote omitted).

If a particular shipper cannot take full advantage of the benefits of containerization, that must result from the economies of his particular business and location in the marketplace. It should not result from the provisions of agreements between the carriers and their employees that preclude entire classes of shippers from fully utilizing containerization. Shippers must be allowed a free choice among different methods of transportation, so that they can discover for themselves whether off-pier container loading will result in cost savings and efficiencies of service. By preventing certain shippers from having such freedom of choice, the Rules on Containers harm the commerce of the United States. *Board of Commissioners of the Port of New Orleans, supra.*

On the basis of our findings and conclusions in this Report, the Commission orders the respondent carriers to remove Rules 1 and 2 of the Rules on Containers from their tariffs. Under the guidelines of *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156 (1962), the possible imposition of civil penalties on the carriers already has been removed from this proceeding and the range of remedies narrowed to a cease and desist order. In addition, the effective date of this order will be delayed for 90 days, consistent with the initial decision in *Sea-Land*, 21 F.M.C. at 35. The period of 90 days also gives the 60-day period for renegotiation contemplated by the carriers and the ILA and set forth in Rule 8 of the Rules on Containers a full opportunity to work, and gives the carriers as many as 30 more days to take whatever steps are necessary after the renegotiations are completed. This remedy serves the public interest and will avoid any unnecessary disruption of the collective bargaining process by giving the parties ample time to accommodate the ILA's interests in some manner other than the present Rules on Containers.

THEREFORE, IT IS ORDERED, That the Presiding Officer's Initial Decision is hereby reversed;

IT IS FURTHER ORDERED, That Rules 1 and 2 of the Rules on Containers are hereby found to be unlawful and violative of sections 14 Fourth, 16 First, 17, second paragraph, and 18(a) of the Shipping Act, 1916, sections 10 (b) (6) (c), 10 (b) (11)-(12) and 10 (d) (1) of the Shipping Act of 1984, and section 4 of the Intercoastal Shipping Act, 1933;

IT IS FURTHER ORDERED, That the carriers listed in Appendix A hereto shall, within 90 days from the date of this order, cease and desist from publishing in their tariffs and enforcing the provisions of Rule 1 and 2 of the Rules on Containers; and

IT IS FURTHER ORDERED, That this proceeding is hereby discontinued.

Joseph C. Polking
Secretary

APPENDIX A

ABC Container Line N.V.
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Secaucus, NJ 07094

Agromar Lines
c/o Gulf and Eastern
29 Broadway
New York, NY 10006

Alcoa Steamship Co., Inc.
P.O. Box 2568
Mobile, AL 36652

American Atlantic Lines
c/o Chester Blackburn
& Roder, Inc.
1775 Northwest 70th
Avenue
Miami, FL 33126

Armasal Line
c/o Smith and Johnson
(Gulf) Inc.
509 Julia Street
New Orleans, LA 71130

Atlantic Cargo Services, AB
One World Trade Center
Suite 3811
New York, NY 10048

Atlantic Container Line, Ltd.
80 Pine Street
New York, NY 10005

Atlanttrafik Express
370 Lexington Avenue
New York, NY 10017

Bangladesh shipping Corp.
c/o Peralta Shipping Corp.
25 Broadway
New York, NY 10004

The Bank & Savill Line
c/o Boyd, Weir & Sewell, Inc.
17 Battery Place
New York, NY 10004

Bank Line, Ltd.
c/o Lavino Shipping
Agencies,Inc.
26 Broadway
New York, NY 10004

Barber Blue Sea Line
Barber Steamship Lines
Inc.
17 Battery Place
New York, NY 10004

Bermuda Container
c/o Norton, Lilly &
Company, Inc.
200 Plaza Drive, Harmon
Meadow
Secaucus, NJ 07094

Bottachi Line
17 Battery Place
New York, NY 10004

Box Lines
17 Battery Place
New York, NY 10004

CCT
1533 Sunset Drive
Coral Gables, FL 33143

Crowley Caribbean Transport
P.O. Box 430960
Miami, FL 33143

Chilean Line
1 World Trade Center
Suite 3861
New York, NY 10048

CMA
c/o TTT Ship Agencies
71 Broadway
New York, NY 10006

Columbus Line, Inc.
One World Trade Center
Suite 3247
New York, NY 10048

Compagnie Generale
Transatlantique; French
Line
25 Broadway, Suite 1006
New York, NY 10004

Compagnie Maritime Zairoise
c/o Roberts Steamship
Agency
500 ITM Bldg.
New Orleans, LA 70130

Compagnie Nationale
Algerienne De Navigation
c/o TTT Ship Agencies, Inc.
71 Broadway
New York, NY 10006

Companhia De Navegacao
Loide Brasileiro
17 Battery Place
New York, NY 10004

Companhia De Navegacao
Martima Netumar
26 Broadway
New York, NY 10004

Compania Peruana de Vapores
c/o Tilston Roberts
17 Battery Place
New York, NY 10004

Compania Transatlantica
Espanola, S.A. ; Spanish
Line
39 Broadway
New York, NY 10006

Concorde Line
c/o Norton Lilly & Co., Inc.
90 West Street
New York, NY 10006

Concordia Line
c/o Boise-Griffin-Steamship
Co., Inc.
One World Trade Center
Suite 3811
New York, NY 10048

Constellation Line
c/o Constellation
Navigation, Inc.
233 Broadway, Suite 640
New York, NY 10007

Contract Marine Carriers, Inc.
1201 Corbin Street,
Port Elizabeth
Elizabeth, NJ 07201

Costa Line
Cargo Services, Inc.
26 Broadway
New York, NY 10004

Dampskibsselskabet Torm A/S;
Torm Lines
c/o Peralta Shipping Corp.
25 Broadway
New York, NY 10004

Dart Containerline Co., Ltd.
Dart Orient Services, Inc.
5 World Trade Center
New York, NY 10048

Delta Steamship Lines, Inc.
P.O. Box 50250
New Orleans, LA 70150

Ecuadorian Line, Inc.
19 Rector Street
New York, NY 10006

E.L.M.A.
c/o Nedlloyd, Inc.
5 World Trade Center
Suite 617
New York, NY 10048

Egyptian National Line
c/o Uiterwyk Corp.
90 West Street
New York, NY 10006

Evergreen Line
Evergreen Marine Corp.
1 World Trade Center
New York, NY 10048

Farrell Lines
One Whitehall Street
New York, NY 10004

Flomerca Line
c/o Kerr Steamship Co., Inc.
1 Market Plaza, Suite 2400
Spears St. Tower
San Francisco, CA 94105

Forest Lines
19 Rector Street
New York, NY 10006

Frota Amazonica S.A.
c/o Omnium Agencies, Inc.
42 Broadway
New York, NY 10004

Galleon Shipping Corp.
c/o Trans Asia Marine Corp.
60 Broad Street
New York, NY 10004

Galapagos Line, S.A.
c/o Boyd, Weir & Sewell, Inc.
17 Battery Place
New York, NY 10004

G.B.S. Line, Ltd.
c/o Phillips-Parr, Inc.
1642 International Trade
Mart
New Orleans, LA 70130

Grancolombiana
One World Trade Center
Suite 1667
New York, NY 10048

Gulf Europe Express
c/o Barber Steamship
Lines, Inc.
17 Battery Place
New York, NY 10004

Hafskip, Ltd.
66 Reade Street
New York, NY 10007

Hapag Lloyd AG
3 Harbor Drive
Sausalito, CA 94965

Hellenic Lines Ltd.
39 Broadway
New York, NY 10006

Hoegh Lines
1999 Harrison Street
Suite 930
Oakland, CA 94612

Holland Pan-American Line
c/o Constellation
Navigation Inc.
233 Broadway, Suite 640
New York, NY 10007

Ibero Lines
c/o Box Line Shipping Co.,
Ltd.
17 Battery Place
New York, NY 10004

Iceland Steamship Co., Ltd.
c/o A.L. Burbank and Co.,
Ltd.
2000 Seaboard Avenue
P.O. Box 7067
Portsmouth, VA 23707

Imparca Express
330 Biscayne Blvd.
Miami, FL 33132

Italian Line
One Whitehall Street
New York, NY 10004

Ivaran Lines
One Exchange Plaza
New York, NY 10006

Japan Line (U.S.A.), Ltd.
1 World Trade Center
Suite 2867
New York, NY 10048

Jeco Shipping Line
c/o Combined Maritime
Agencies, Inc.
Suite 2100
50 Broadway
New York, NY 10004

Jugolinija
c/o Crossocean Shipping
Co., Inc.
One World Trade Center
Suite 2045
New York, NY 10048

K Line
c/o Kerr Steamship Agencies
2 World Trade Center
99th Floor
New York, NY 10048

Kirk Line
c/o Eller & Company, Inc.
3000 Biscayne Blvd.
Miami, FL 33137

Koctug Line
c/o United States Navigation,
Inc.
One Edgewater Plaza
Staten Island, NY 10305

Korea Shipping Corp., Ltd.
c/o Korea Shipping
America, Inc.
71 Broadway
New York, NY 10006

Lignes Centrafricaines
c/o Oceans International
Corp.
1314 Texas Avenue
Suite 1112
Houston, TX 77002

Linea Manaure C.A.
3000 Biscayne Blvd.
Miami, FL 33137

Lykes Bros. Steamship Co., Inc.
300 Poydras Street
New Orleans, LA 70130

Maersk Line
Moller Steamship Company,
Inc.
One World Trade Center
Suite 3527
New York, NY 10048

Mar Chile Line
c/o TTT Ship Agents, Inc.
71 Broadway
New York, NY 10006

Maritime Company of
the Philippines
c/o North American
Maritime Agencies
17 Battery Place
New York, NY 10004

Medafrica Line
22 Cortlandt Street
New York, NY 10007

Mexican Line
c/o Norton, Lilly & Co., Inc.
200 Plaza Drive, Harmon
Meadow
Secaucus, NJ 07094

Mitsui O.S.K. Lines, Ltd.
One World Trade Center
Suite 2211
New York, NY 10048

Moore-McCormack Lines
27 Commerce Drive
Cranford, NJ 07016

Nacional Line
c/o Norton, Lilly & Co.
200 Plaza Drive,
Harmon Meadow
Secaucus, NJ 07094

Namucar Line
c/o Tilston Roberts Corp.
17 Battery Place
New York, NY 10004

Naviera Central, C.A.
c/o TMT Corp.
P.O. Box 2110
Jacksonville, FL 32203

Nedlloyd Lines
5 World Trade Center
Suite 617
New York, NY 10048

Neptune Orient Lines, Ltd.
300 Montgomery Street
San Francisco, CA 94104

Nigeria America Line
c/o Crossocean Shipping
Co., Inc.
One World Trade Centrer
Suite 2045
New York, NY 10048

Nigeria Star Line
c/o Mediterranean Agencies
One World Trade Center
Suite 2969
New York, NY 10048

Nippon Yusen Kaisha
333 Market Street
San Francisco, CA 94105

Nopal Lines
c/o Lorentzen Shipping
2125 Biscayne Blvd.
Miami, FL 33137

Nordana Line
c/o Barber Steamship
Lines, Inc.
17 Battery Place
New York, NY 10004

Ocean World Lines
9 Murray Street, Suite 11-E
New York, NY 10007

Orient Overseas Container Line
c/o Dart Orient Services, Inc.
5 World Trade Center
New York, NY 10048

P.A.C.E. Line
One World Trade Center
Suite 8101
New York, NY 10048

Pakistan National Shipping
Corp.
c/o Crossocean Shipping Co.
Suite 2045
One World Trade Center
New York, NY 10048

P&O Strath Services
Two Rector St, Suite 2208
New York, NY 10006

Polish Ocean Lines
One World Trade Center
Suite 3557
New York, NY 10006

Portuguese Line C.T.M.
c/o Tilston Roberts Corp.
17 Battery Place
New York, NY 10004

Prudential Lines, Inc.
One World Trade Center
Suite 3701
New York, NY 10048

Puerto Rico Maritime Shipping
Authority
c/o Puerto Rico Marine
Management, Inc.
Raritan Center Plaza One
Edison, NJ 08818

Rocargo, C.A.
c/o Lorentzen Shipping
2125 Biscayne Blvd.
Miami, FL 33137

Ro-Lo Pacific Line
c/o Trans-American
Steamship Agency Inc.
100 California Street
San Francisco, CA 94108

Royal Netherlands
Steamship Co.
Five World Trade Center
Suite 7411
New York, NY 10048

Salen Dry Cargo
DBA Salen Project/Liner
Services
c/o International
Consultants, Inc.
17 Battery Place, Suite 1930
New York, NY 10004

Saudi Concordia
Shipping Co., Ltd.
c/o Boise-Griffin Steamship
Co. Inc.
One World Trade Center
New York, NY 10048

Saudi National Lines
c/o Costa Line Cargo
Services, Inc.
26 Broadway
New York, NY 10004

Scindia Steam
Navigation Co., Ltd.
c/o U.S. Navigation, Inc.
One Edgewater Plaza
Staten Island, NY 10305

Sea-Land Service, Inc.
10 Parsonage Road
P.O. Box 800
Iselin, NJ 08830

Shipping Corp. of India, Ltd.
c/o Norton, Lilly & Co., Inc.
200 Plaza Drive, Harmon
Meadow
Secaucus, NJ 07094

South African Marine
Corp., Ltd.
One Bankers Trust Plaza
New York, NY 10006

Span-Chile Line
5 World Trade Center
Suite 617
New York, NY 10048

Surinam Line
c/o Hansen & Tidemann, Inc.
Agents
One Greenway Plaza,
Suite 1000
Houston, TX 77046

TMS Line
c/o Trans Marine
Shipping Corp.
29 Broadway
New York, NY 10006

Trans Caribbean Lines
3301 N.W. South River Drive
Miami, Florida 33142

Trans Freight Lines
65 Willowbrook Boulevard
Wayne, NJ 07470

Transnave-Transporte Navieros
Ecuatorianos
c/o U.S. Navigation, Inc.
One Edgewater Plaza
Staten Island, NY 10305

Trikora Lloyd
c/o Kerr Steamship
Company, Inc.
2 World Trade Center
New York, NY 10048

Uiterwyk Shipping Lines
c/o Uiterwyk Corporation
3105 West Waters Avenue
Tampa, FL 33614

United Arab Shipping Co.
(S.A.G.)
c/o Kerr Steamship Co., Inc.
2 World Trade Center
99th Floor
New York, NY 10048

United States Lines, Inc.
27 Commerce Drive
Cranford, NJ 07016

U.S. Africa Line
c/o East Coast Overseas
80 Broad Street
New York, NY 10004

Venezuelan Line
One World Trade Center
Suite 2073
New York, NY 10048

Waterman Steamship Corp.
120 Wall Street
New York, NY 10005

Westwind Africa Line, Ltd.
c/o Southern Star
Shipping Co., Inc.
245 Park Avenue
New York, NY 10017

Yamashita Shinnihon
Steamship Co.
c/o Stanley Levy
550 Kearny Street
San Francisco, CA 94108

Yangming Marine
Transport Corp.
c/o Solar International
Shipping Agency
Two World Trade Center
Suite 2264
New York, NY 10048

Zim Israel Navigation Co., Ltd.
One World Trade Center
Suite 2969
New York, NY 10048

APPENDIX C
Initial Decision of John E. Cograve, Administrative Law Judge

FEDERAL MARITIME COMMISSION

NO. 81-11

"50 MILE CONTAINER RULES" IMPLEMENTATION BY OCEAN COMMON CARRIERS SERVING U.S. ATLANTIC AND GULF COAST PORTS—POSSIBLE VIOLATIONS OF THE SHIPPING ACT, 1916

The collectively bargained Rules on Containers found not to violate the Shipping Act, 1916, or the Shipping Act, 1984.

Dennis N. Barnes for Respondent Moller Steamship Co.

James W. Pewett, Ronald A. Capone, and *Russell T. Weil* for Respondents Puerto Rico Maritime Authority and Central Gulf Lines, Inc.

Frederick L. Shreves, John P. Meade, Edwin Longcope, and *Allan J. Berdon* for Respondent Dart Containerline Company, Ltd.

William Karas and *Amy Loeserman Klein* for Respondent Atlantic Container Line Ltd.

David N. Dunn, Charles F. Warren, and *George A. Ouadrino* for Respondents Japan Line, Ltd., Kawasaki Kisen Kaisha, Ltd., Mitsui O.S.K. Lines, Ltd., Nippon Yusen Kaisha, and Yamashita Shinnihon Steamship Co., Ltd.

Seymour H. Kligler, David A. Brauner, and *Nathan J. Bayer* for Respondents Empresa Lineas Maritimas Argentinas, S.A., Orient Overseas Container Line, and South African Marine Corp., Ltd.

Richard A. Hagan and *Peter J. King* for Respondent Companhia de Navegacao Lloyd Brasileiro.

Robert J. Remmer for Respondent Coordinated Caribbean Transport, Inc.

John P. Love for Respondents American Atlantic Lines and Pan Atlantic Lines.

John H. Dougherty and *Neal M. Mayer* for Respondent Trans Freight Lines, Inc.

Robert S. Zuckerman, Oliver J. Trytell, and *John M. Ridlon* for Respondent Sea-Land Service, Inc.

William P. Verdon, Thomas D. Shea, and *Daniel W. Lenehan* for Respondent United States Lines, Inc.

Stanley O. Sher, John R. Attanasio, and *Robert A. Hazel* for Respondents Costa Line, Hapag-Lloyd Aktiengesellschaft, Italian Line and Nedlloyd Lines.

Richard E. Hull for Respondent Transporte Navieros Ecuatorianos (TRANSNAVE).

Derek A. Walker for Respondent Venezuelan Line.

R. Lawrence Kurt for Respondent Lykes Bros. Steamship Co., Inc.

C.P. Lambos and *Donato Caruso* for Intervenor New York Shipping Association, Inc., and for Respondents American Atlantic Lines, Associated Container Transportation (U.S.A.)—Pacific American Container Express, The Bank Line Limited, Barber Blue Sea Line, Coordinated Caribbean Transport, Galleon Shipping Corp., Jugolinija, Koctug Line, Linea Manaure, C.A., Maersk Line, Moore McCormack Lines, Inc., Polish Ocean Lines, Torm Lines, Waterman Steamship Corp. and Yangming Marine Transport Corp.

R. Frederic Fisher for Intervenor Pacific Maritime Association.

Francis A. Scanlan, A. Adgate Duer, and *Braden Vandeventer* for Intervenor Council of North Atlantic Shipping Associations.

Raymond P. deMember for Intervenors The International Association of NVOCCs and The Florida Custom Brokers & Forwarders Association.

Thomas W. Gleason and *Ernest L. Mathews, Jr.,* for Intervenor International Longshoremen's Association, AFL-CIO.

Gerald H. Ullman for Intervenor National Customs Brokers & Forwarders Association of America, Inc.

William H. Towle for Intervenor American Warehousemen's Association.

J. Alan Lips and *Kevin M. Williams* for Intervenor American Trucking Associations, Inc.

G.E. Strange for Intervenor Houston Customhouse Brokers and Freight Forwarders Association.

Charna J. Swedarsky and *Alan J. Jacobson* for Bureau of Hearing Counsel.

INITIAL DECISION[1] OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE

This case involves the legality under the Shipping Act, 1916, and the Shipping Act, 1984, of the Rules on Containers, the collectively bargained response to the technological innovation of containerization.[2] In their simplest form the Rules prohibit ocean carriers from supplying shipping containers to persons located within 50 miles of the carrier's pier unless the containers are to be loaded (1) by ILA labor, or (2) by the shipper's own employees at the shipper's own facilities. Import cargo, not FSL, must be warehoused 30 days to avoid stripping at the pier.

The Parties

When the Commission began this proceeding, 142 common carriers by water were named as respondents. A series of dismissals reduced the number to 122 and in an Interim Report and Order (served February 5, 1982),[3] the Commission directed that Hearing Counsel select from the remaining carrier respondents a representative sampling of 36 carriers which would then become the "active" respondents in the case (for a list of the respondent carriers, see Appendix A).

The New York Shipping Association (NYSA), the Council of North Atlantic Shipping Associations (CONASA) and the International Longshoremen's Association (ILA) intervened in support of the Rules. NYSA is a not-for-profit membership corporation made up of stevedores, steamship carriers and other

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[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227)

[2] Containers are large reusable metal receptacles ranging in length from 20 feet to 40 feet which can be moved on and off the ship unopened. Containerships are specifically designed and constructed to carry the containers. A container can also be attached to a truck chassis and transported intact to and from the pier like a conventional trailer.

[3] This proceeding was originally restricted to filing of affidavits of fact and memorandum of law. The Interim Report and Order was issued as a result of this first phase of the proceeding.

employers of longshore labor in the Port of New York. CONASA is an unincorporated not-for-profit association. Its members are the constituent local port associations on the North Atlantic Coast, including, until 1977, NYSA, and until 1982, the Boston Shipping Association. Since 1971 CONASA has acted as a multi-employer bargaining representative in negotiating and administering master bargaining contracts with the ILA. Prior to the formation of CONASA, East and Gulf Coast ports generally adopted the master terms of the agreement worked out in New York. The ILA is an unincorporated labor association (union), which for many years has been the exclusive representative of longshoremen and other dockworkers employed in ports from Maine to Texas.

Intervening in opposition to the Rules were International Association of NVOCC's (IANVO), an unincorporated trade association of non-vessel operating common carriers; the National Customs Brokers and Forwarders Association of America, Inc. (NCBFAA), and the Florida Customs Brokers and Forwarders Association (FCBFA). The NCBFAA is an unincorporated national trade association consisting of 392 members operating as freight forwarders and customs brokers. The FCBFA is an unincorporated local trade association of 137 customs brokers and forwarders engaged in business in the state of Florida. The American Trucking Association, Inc. (ATA) also intervened in opposition to the Rules. ATA's constituent members are state trade associations representing trucking companies engaged in interstate trucking. There are some 13,359 members of the state associations, of these about 1,190 are said to be engaged in activities involving containers. The American Warehousemen's Association (AWA) is an unincorporated association with a membership of 568 companies, and it, too, intervened in opposition to the Rules. These parties were collectively named as proponent-intervenors.[4]

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[4] They are opposed to the Rules and argue that they are unlawful. They are the proponents of an order requiring the respondents to cease and desist in the implementation of the Rules. They are referred to here simply as "proponents." Unless otherwise specified, the term "proponents" includes Hearing Counsel.

Hearing Counsel was made a party to the proceeding under Rule 42 of the Commission's Rules of Practice and Procedure (46 CFR § 502.42) and generally opposes the Rules.

Findings of Fact

Historically, longshoremen and related workers performed all the work of loading and unloading cargo ships. This work covered all movement of ocean cargo from the tailgate of the delivery truck to the hold of the vessel for export cargo and the reverse for import cargo. For many years dockworkers in all ports on the Atlantic and Gulf Coasts have prepared and handled cargo piece-by-piece for ocean shipment, making up and loading export cargo on drafts, pallets and boxes and breaking down cargo on import shipments for tender to the inland carriers. Containerization changed all this. It began in the mid-1950's when Sea-Land Service, Inc. (then Pan-Atlantic Steamship Co.) inaugurated a fully containerized service in the Puerto Rican trade. Containerization began spreading to other trades in the late 1960's and early 1970's.

From the beginning the ILA and the carriers have disagreed on the use of the containers. The carriers have generally sought the unrestricted movement of containers on and off the piers. The ILA has resisted this effort at every opportunity.[5]

The first collective bargaining session at which containerization was an issue occurred in New York in 1959. The agreement reached at that session permitted the carriers (members of NYSA) to use all types of containers and to transport owner-handled full shipperload (FSL) shipments without pierside handling of the contents by longshoremen. The FSL containers were, however, subject to the payment of a royalty the amount of which was fixed by an arbitrator's award. Under the agreement less-than-containerload shipments and consolidated cargo originating in

[5] Armed with statistics which it said showed the steady, uninterrupted decline in the jobs and man-hours caused by containerization, the ILA has over the years fought the carriers' position on containerization at every bargaining session. Time has not eased the intensity of the conflict and the years of strife have been marked by strikes, threats of strikes, wildcat job actions, grievances, arbitrations and court actions.

or destined to a point within the area of the Port of New York was to be stuffed and stripped at the piers.

The ILA thought the 1959 agreement was inadequate and in both 1962 and 1964, the ILA entered the bargaining with the demand for pierside stuffing and stripping of *all* containers. However, both the 1962 and the 1964 agreements continued the 1959 arrangement. Sea-Land's 1967 announcement of fully containerized service in the North Atlantic trade and the plans of other major carriers to begin container operations led the ILA to adopt a resolution at their 1967 convention calling for a collective bargaining agreement which would require the stuffing and stripping of *all* containers at the piers. The NYSA rejected the demand, and a 57-day strike ensued. A Presidential Board of Inquiry was then established under the Taft-Hartley Act. The Board in its report cited the impact or consequences of containerization on pierside work as one of two critical issues preventing agreement. A mediator was appointed and agreement was finally reached in January of 1969.

The ILA agreed to continue the basic compromise first reached in 1959 but insisted upon a codification of all existing practices and rules that had been developed and formulated in the 10 years since the 1959 agreement. The result was the Rules on Containers.

Union complaints that carriers were violating the contract by supplying containers to off-pier consolidators lead to the adoption of the Dublin Supplement. The Supplement required that carriers not make containers available to off-pier consolidators so that cargo subject to the Rules would be delivered to the piers in breakbulk for stuffing into containers on the pier. In 1974 negotiations resulted in the readoption of the same Rules which had been in effect since 1959, and codified in 1968. The Dublin Supplement was incorporated into the 1974-77 Rules, and these have remained intact to this date without any substantive changes.

The Rules apply only to containers owned or leased by the steamship lines. The underlying principle of the Rules is that the loading and unloading of an ocean carrier's containers must be done at the piers except for (1) certain specified commodities

(mail, household goods and the personal effects of military personnel); (2) full shippers load (FSL) cargo to be stuffed or stripped at the owners' premises by their own employees; and (3) import FSL to be delivered to the purchaser-consignee at its own warehouse and unloaded there by its own employees or cargo to be publicly warehoused for at least 30 days. The Rules prohibit the intact transport of non-excepted cargo loaded or unloaded within 50 miles of a port. They require this cargo to be stuffed (export cargo) or stripped (import cargo) at the marine terminals by the longshoremen.

The purpose of the Rules is not the stripping and restuffing of previously loaded containers, but rather to have the cargo delivered loose to the piers so the container may be loaded or unloaded in the first instance by longshoremen. On import shipments, the ocean carriers are in a position to assure that this objective is obtained by having the container unloaded at the pier and the cargo turned over breakbulk to the inland carrier. On export shipments, however, attempts to evade the Rules may result in preloaded containers arriving at the piers. When this happens the container must be stripped and restuffed to achieve the basic objective of the Rules, i.e., work for longshoremen. Pierside stripping and restuffing is designed to induce the carriers to make sure that nonexcepted cargo is delivered to the piers breakbulk.

If a container which should have been stuffed or stripped at the pier passes through intact, the Rules provide for the imposition of liquidated damages. The initial amount was $250 per violation but this was an insufficient disincentive, and it was increased in 1971 to $1,000. Recently the liquidated damages were doubled in cases where the carrier wilfully participates in the violation. The Rules are silent on the right or duty of the carriers to pass on to their customers either the liquidated damages or the cost of pierside handling.

There are a little over 15,000 NVO's, motor carriers, customs brokers, warehousemen and freight forwarders "represented" in this proceeding. However, in responses to discovery requests, only 30 claimed any effect from the 1981 implementation of the Rules. Of 790 NVO's with tariffs on file at the Commission, only

five claimed harm, and of 137 Floridian customs brokers only six alleged that they were affected by the implementation of the Rules. There are 392 freight forwarders and custom brokers members of the NCBFAA but only 12 claimed that the 1981 implementation had any effect upon their businesses. Of the over 13,000 members of the ATA's constituent state associations, ATA claimed that 1,190 were engaged in activities involving the transport of ocean containers. Of these ATA provided the names of 257 motor carriers to whom it furnished discovery requests. Of these, just two truckers claimed any effect on their operations from the implementation of the Rules. Of the 554 warehouse companies comprising the AWA only 5 claimed any harm from the implementation of the Rules.

A preliminary word about the nature of the evidence adduced at the hearing in this case is necessary. In addition to the familiar problems of "relevance," "materiality" and the "credibility" of witnesses all of which are presented here, there is an additional problem generated by the discovery process. The respondents served two sets of discovery requests on proponents. The first set was designed to identify the particular individuals who had been harmed by the 50 Mile Rule while the second set was designed to elicit from those harmed the *specific* data on which they relied to establish the precise nature, extent or degree of that harm. The second set was, of course, sent only to those who had alleged harm in their responses to the first set. For example, respondents demanded the production of financial statements from the companies of all proponents' witnesses for the years 1981 and 1982. None complied. The subsequent testimony of these witnesses must be weighed against the failure to provide any supporting data, itemizing or analyzing the general assertions of harm. On balance, such testimony can be given little or no weight.

The findings set forth below are based on the proposed findings of the parties and include consideration of the relevance, materiality and support in the record for each proposal. Where a proposed finding was based upon the oral testimony of a witness, the observed credibility of that witness was considered. Specific findings requested but not made were rejected as irrelevant or

immaterial, not support by the record or not necessary to the decision.

The foremost antagonist of the Rules is the nonvessel-owning common carrier (NVO), or as it is sometimes known, the consolidator. These entrepreneurs gather the cargoes of small shippers (consolidate them) until there is enough to fill an entire container which is then shipped in the NVO's name.

There were no NVO's prior to the development of containerization. The NVO's off-pier operations were made possible by the carriers release of containers to off-pier consolidators and the promulgation of special consolidation allowances and Freight All Kinds (FAK) rates. The FAK rate is available only when the goods of more than one shipper are carried in one container as a single unit. As more people entered the NVO industry, competition for cargo between NVO's became intense and led to increases in commission levels paid by NVO's. At least one NVO has paid brokerage of as much as 25%. Brokerage paid by NVO's in the North Atlantic trade averages between 18 and 25 percent.[6]

The rate for less-than-containerload (LCL) cargo varies depending upon its weight or measurement.[7] If the ocean carriers charged commodity rates for LCL cargo whether it was containerized on pier or off pier then there would be no differential or margin available to an NVO within which it could make money. Not all NVO's actually physically handle the shipments and those which do not have no employees, facilities or equipment for the pickup and delivery and loading and unloading of cargo. Some subcontract this work to warehousemen or other NVO's. Some even have the containers loaded and unloaded at the pier by the

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[6] In providing the stuffing and stripping service, a forwarder or customs broker may become an NVO simply by filing a tariff with the Commission or it may simply provide the services of an NVO either directly or through a subcontractor. If the services provided by the forwarder do in fact make him an NVO, then he must file a tariff with the Commission.

[7] If a less-than-containerload parcel of cargo is booked by the carrier, it is charged the commodity rate even though it might be loaded into a container with other parcels which, taken together, make a full containerload.

steamship companies employees. With a few exceptions NVO's do not lease containers.

Approximately 97% of all NVO's are affiliates of trucking, warehouse, forwarder or custom broker companies. These NVO divisions can be easily organized with relatively little capital. This low risk, characterized by the absence of any substantial investment and ease of entry, has contributed to the relatively high turnover rate among NVO's.

The overwhelming majority of NVO's 515 out of 600, are located in the coastal states, usually within the city limits of the major port cities. Regardless of their location, NVO's in most cases arrange for the loading and unloading of containers at facilities close to the piers. Although there are some 85 NVO's with addresses outside the coastal states with 52 concentrated in the Chicago area, there is no evidence that any loading or unloading takes place outside the port areas. Roughly 62% of LCL cargo transported via New York originates or is destined for locations located within 15 miles of the port and 71% within 50 miles of the port.

The NVO's offer services such as shrink wrapping, pallet shaving, special packaging, cargo marking and palletizing to their shippers. These "special services" offered to shippers by NVO's are a factor in attracting shippers to the NVO's operation. Where these services are also available at the pier, the record contains no cost comparison between the NVO's charges and those at the pier. While these special services aid in attracting shippers to the NVO's, the lower rates offered by NVO's appear as the major inducements to shippers. Nothing in the Rules would prevent NVO's from performing these "special services" if after doing so the cargo is delivered loose to the pier for loading into containers by the longshoremen. The cost of loading the container on the pier is, on this record at least, not susceptible to precise calculation. The evidence suggests, however, that it would run from around $200 to about $400 a container depending upon such things as type of cargo, productivity of labor, need for overtime, etc.

A constant theme, played by proponents throughout this case is the "benefit" which small shippers receive from their op-

erations. This continued insistence upon shipper benefit notwithstanding, there is no shipper testimony, either oral or by affidavit in the record. The only evidence in this record of benefit to shippers from the consolidators' operations is in the form of the self-serving assertions of the consolidators themselves.

Florida International Forwarders (FIF) has been a freight forwarder in the Port of Miami for 30 years.[8] In addition to forwarding, FIF performs warehousing functions under the name of International Traffic Development. International's warehousing business consists entirely of referrals from FIF. Some of FIF's customers maintain rather large inventories in International's warehouse and at the customers' instructions FIF selects the merchandise for particular shipment from this inventory. In January of 1981, FIF was told by some of the ocean carriers operating out of Miami that they would no longer accept containers loaded at FIF's facility. FIF was also told, presumably by these same carriers, that if it used Twin Terminal Services, which employed ILA labor, to load its containers, the lines would then accept them. Under the arrangement subsequently worked out, FIF would call Twin Terminal which would send men to load the container furnished by the carrier. If Twin Terminal Services had no men to send over, FIF loaded the container with its own men. The container was then picked up by Twin Terminal and delivered to the ocean carrier. Even though the work was done by FIF, Twin Terminal collected the charge for loading the container. There is no evidence in the record on the number of times this occurred.

The record is devoid of any figures on the degree to which FIF's business was affected by the implementation of the Rules. FIF's case for harm is found in the statement of Mr. Gazitua that, "Our service was interrupted when the 50 Mile Rule went into effect, and naturally this jeopardized the customers which we were handling by reducing the amount of orders they could place because of additional costs."[9] On cross examination Mr. Gazitua

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[8] Appearing as a witness for FIF was Mr. John L. Gazitua, President of FIF.

[9] Although it would seem a relatively straightforward task, no apparent attempt was made to quantify this "reduction in the amount of orders" placed by FIF customers.

supposed that about 10% of his business was "affected" by the rule. This estimate was unsupported by figures or facts on volume of business prior to and after the implementation of the Rules. Mr. Gazitua's explanation on the witness stand of the alleged loss of business cast serious doubt on its reliability even as an estimation.[10]

Finally, Mr. Gazitua said that FIF had approximately 30 shipments "affected" by the Rules. An unspecified number of these were subjected to some unspecified "extra charges," some were moved using Twin Terminals, and others were "held X period of time while we tried to find out what the situation was." Just what all this meant in volume, in dollars and cents or in inconvenience to the client was never specified or quantified, and all the shipments moved in the end. In short no quantification of the impact of the Rules on FIF is possible on the basis of this record.

Worldwide Air Marine is a freight forwarder located in Hialeah, Florida. Mr. Mario P. Rodriquez, President, testified on Worldwide's behalf. Essentially, its operation is the same as FIF's. It operates a warehouse and consolidates and forwards the cargo of its customers. Like FIF Worldwide was told that the ocean carriers would refuse its containers unless they were loaded by ILA labor either at the Twin Terminals facility or at the pier. Worldwide did use the services of Twin Terminals on an unspecified number of shipments.

Mr. Rodriquez's direct testimony did not contain one specific quantitative fact or figure showing the impact of the Rules on Worldwide's business. However, in response to an earlier interrogatory Mr. Rodriquez said that approximately 30% of his

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[10] FIF's business also includes traditional forwarding functions and this cargo "goes directly to the dock." Another part of the business is that of warehousing, consolidation, and forwarding. It is this part of the business which is "affected" by the Rules, but Mr. Gazitua says the 10% refers to FIF's "total" business because all of his business depends upon the "flexibility" the warehouse operation provides. This is without support in the record and, where intelligible, is somewhat inconsistent with other parts of Mr. Gazitua's testimony.

business had been affected by the Rules. When asked what specific business was affected Mr. Rodriquez said:

> Well, we receive cargo in our warehouse from many sources, which we combine, and when we complete trailerloads or containerloads we stop, and that's our specialty, and we do a lot of business, and that thirty percent is only the actual income from the fees that warehousing work and the stuffing of containers. Because in there I don't include what we make in forwarding fees, and other services we perform for our customers.

As in the case of FIF, there are no figures on total revenues, no intelligible breakdown of Worldwide's different operations and no figures on volume of cargo, etc. There is simply no way of telling just what 30% of "warehousing" and "stuffing" means in the context of Worldwide's total operation. Nor is there any means of determining just which practices under the Rules affected this 30% of the business.

Worldwide still sends "a lot of cargo to the pier" and in the words of Mr. Rodriquez, ". . . we don't mind at all that the ILA charges for their services on LTL (less than trailerload) cargo." In Mr. Rodriquez's view it is the warehouse consolidation operation that cannot be done "by the ILA label."[11]

All Americas Marine Forwarding is a licensed freight forwarder with a subsidiary, Ocean Air Trucking and Warehousing which as its name implies performs trucking and warehousing services.[12] Another corporation, All Americas Forwarding Company is engaged in air-forwarding. The warehousing services of Ocean Air are performed almost entirely for All Americas Marine. During the 1981 implementation of the Rules, All Americas Marine was refused containers by a number of ocean

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[11] It would, of course, be possible to perform all the operations except the actual loading of the container. The cargo could be consolidated, wrapped, packed, or whatever, and sent as LTL cargo to the pier where ILA labor could then load it in a container.

[12] All Americas became an NVO in 1982.

carriers and used the services of Twin Terminals on those shipments.[13]

Mr. Perez suggests that implementation of the Rules would result in loss of "flexibility" and an increase in "pilferage." As for the increase in pilferage the records contain no evidence, examples or figures which support this assertion. Mr. Perez concludes:

> If the 50 Mile Rule is implemented, I believe that the impact on my business will be a reduction of no less than 50 to 75 percent in cargo being sent to be grouped in containers.

This belief of Mr. Perez is not tied to any facts of record nor is it based upon any identifiable past experience; neither is there any explanation of how much of the total business of All American Marine is represented by "cargo being sent to be grouped." Here as in cases of FIF and Worldwide, there is simply no way to gauge the impact of the Rules on All Americas Marine.

Tuya International Corporation is a licensed freight forwarder operating in Miami, Florida. Mr. Oscar C. de Tuya, Jr., is Chairman of the Board of Tuya International and testified on the corporation's behalf. Several of the ocean carriers out of Miami refused to accept containers from Tuya and the services of Twin Terminals were used at $250 per 20-foot container. This cost was absorbed by Tuya. Mr. de Tuya was unable to say how much of his business had been affected by the Rules. However, "some" of Tuya's customers held their shipments in the warehouse pending future developments. This cargo eventually moved, usually by the use of the services of Twin Terminals.

Dolphin Forwarding Inc. is an NVOCC located in Brockton, Mass. Dolphin provides NVOCC services to Puerto Rico primarily through the Port of New York. EGI Warehouse, a division of Dolphin, is a public warehouse providing warehousing services for the general public and consolidation of cargo for Dolphin.

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[13] Mr. Roberto A. Perez, President of All Americas Marine stated that at the time of the 1981 implementation of the Rules Twin Services' charges for "stripping and restuffing" an already loaded container "averaged roughly $200 for 20-foot containers and $300 for a 40-foot container." The record does not show what Twin Terminals' charges for just loading a container were, or why All Americas Marine did not do as FIF did and have Twin Services personnel come to its warehouse to load containers in the first instance.

World Transport an ICC regulated motor carrier is a wholly owned subsidiary of Dolphin which uses its drayage services.

Dolphin serviced 293 containers in 1981, 80% of which (except for the first two months of the year) moved through New York and 20% through Jacksonville. During January of 1981 some 36 containers intended for New York were shipped out of Jacksonville, Fla., where they were not rehandled by ILA labor. The cost of overland transportation for these containers was between $1,196 and $1,400 which was an increase in total cost of 11%.

During the period of the 1981 implementation of the Rules, Dolphin leased 11 trailers for a period of 30 days to avoid application of the Rules. Dolphin is leasing some containers today[14] at a rate of approximately $330 a month but this figure standing alone is of no use. What is needed are figures showing Dolphin's total cost of moving a leased container as against the total cost of moving a container loaded on-pier by ILA labor.[15]

Alltransport is both a freight forwarder and an NVOCC. It is also a customhouse broker and has a property broker license from ICC.

Alltransport numbers among its affiliates Seaway Forwarding Corp. which operates in the Midwest, All Air Transport (which is the air freight division), Cartall Trucking Corp., and ATI Travel Agency. Alltransport has facilities in New York, Chicago, Baltimore, Norfolk, Los Angeles, New Orleans, and Houston. Alltransport is a "wholly owned subsidiary [of] the Swiss transport agent, Duazas A.G. Ms. Rosanne M. Esposito, an As-

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[14] Dolphin began leasing containers after the 50 Mile Rule was again implemented on April 19, 1983.

[15] A number of further findings are proposed by counsel on the basis of the written direct testimony of Mr. Lee who spoke for Dolphin. However, the proposals ignore the responses elicited on cross-examination. For example, Mr. Lee in his direct testimony went on at some length on the unacceptable disadvantages of employing ILA labor, but later admitted on cross-examination that none of the predicted consequences was based on his own experience but, rather, except for four instances of really irrelevant personal experience over 20 years, the predictions were based upon the written "filed" direct testimony of other NVO's in this case which he had apparently read before testifying.

sistant Vice President, testified for Alltransport.[16] Ms. Esposito has been with Alltransport since March 2, 1984.

Alltransport's NVOCC operation comprises about 10% of its total business.[17] As an NVOCC Alltransport receives cargo, prepares documentation,[18] segregates the cargo, loads it into containers and delivers the cargo to the underlying water carrier at the pier. If cargo was delivered loose to the pier, Alltransport claims it would lose some of its control over the cargo and its ability to provide services such as export packing, etc. However, direct delivery from shipper to pier is not the only alternative. The cargo can still be sent to Alltransport's warehouse for consolidation and whatever other services are to be performed and then trucked to the pier. This is said to result in extra charges for the truckhaul of the cargo to the pier and the unloading of the cargo at the pier. No figures are offered, however, on the difference between getting the cargo to the pier in a truck and getting the container to the pier.

Several other forwarders, customs brokers and NVO's submitted statements that the Rules had an impact on their businesses. However, the assertions made by these people are of no value in measuring the degree or extent of the harm suffered. A few examples will show the nature of this "testimony."

Wilson Container was refused an unspecified number of containers by Hapag-Lloyd and its container services were brought to a "virtual stand-still" by the Rules. Miami International Forwarders and Rogers Brown Customs Brokers were "refused containers." Vague assertions such as these, unsupported

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[16] Ms. Esposito did not submit written direct testimony in advance of the hearing but rather appeared in response to a subpena of Hearing Counsel. A Mr. Wolfgang Lederer, President of Alltransport, refused Hearing Counsel's request for a written statement either by Ms. Esposito or any other employee of Alltransport.

[17] These are estimates of the witness which she admits are "difficult." This makes Mr. Lederer's refusal to submit a written statement even more unfortunate because as Ms. Esposito says, "there are a lot of statistics which are maintained by the corporate group." These statistics could have been used in preparing meaningful written direct testimony.

[18] Presumably the documentation is prepared under the forwarding license.

by any data whatsoever, leave unanswered critical questions and are not entitled to any weight.

The two findings set out below, proposed by the proponents, provide illustrations of yet another problem with the proponents' approach to the "evidence" in the record. The two proposed findings are:

> Posey International, a customs broker, *states* that its customers' containers are stripped at off-pier facilities which materially reduced the damage and pilferage previously experienced at the piers. (Emphasis mine.)
>
> Leyden Customs Expediters, Inc., a customs broker, *states* that when containers are stripped at the pier in compliance with the ROC, they encountered long delays, misdeliveries, and shortages. (Emphasis mine.)

There are two problems with these proposed findings. The first, which has been already noted is that they are devoid of specific figures or examples and are couched in terms too general to be of any use. The second problem is that the proposed findings do not request that I find as a fact that Posey's off-pier stripping reduced damage, etc. and that Leyden actually experienced long delays etc. when containers were stripped at the pier. Rather the proposal would have me find only that Posey and Leyden made those statements. There is a vast difference between a finding that a person made a statement and a finding that the statement made is one establishing a fact supported by evidence of record. Unsupported by hard evidence these proposed findings remain nothing but opinion or unfounded assertions.[19]

Near the close of the hearing Proponents presented Mr. Michel G. Fuchs as a rebuttal witness. Mr. Fuchs is President of Express Consolidation Systems Corp. and appeared on behalf of the International Association of NVOCC's and has had 14 years' experience working for an ICC freight forwarder, for Seatrain, and finally for Sea-land. He began his own business in October of 1982. Although Mr. Fuchs purported to be testifying for the

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[19] For an earlier treatment of this problem, see *Council of North Atlantic Shipping Associations* v. *American Mail Lines*, 21 F.M.C. 96, 99 (I.D. 1977), *adopted*, 21 F.M.C. 91 (1978).

whole NVO industry, his testimony was not based on data taken from industry business records or for that matter any other industry-wide data. Mr. Fuchs did not even use his own business record since he did not want "to prepare a testimony that would be very much focused on the activities of [his] own company." Rather Mr. Fuchs' testimony was based upon telephone conversations with NVO's, warehousemen, "shipping executives" and "friends in general." Mr. Fuchs kept or made no records of his conversations and was unable to supply the names of all the companies he contacted—asking to be excused at one point for his "poor memory." The companies contacted were told by Mr. Fuchs that the purpose of the inquiries was to aid him in preparing testimony for use in litigation.

Mr. Fuchs estimates that his average revenue per ton of cargo is $138, yet an examination of Express Consolidation's tariff reveals an average revenue per ton of $182.33.[20] Mr. Fuchs suggests that his average net profit on a 20-foot container is $365.55. Respondents would argue that Consolidated Express' net profit ranges from $741.95 to $1,054.74 per twenty-foot equivalent unit (TEU). It seems safe to say that the actual figure lies somewhere between the two extremes.

The testimony does not resolve the dispute between the proponents and respondents concerning the relative merits of stuffing and stripping off pier or on the pier. When a truck delivers LCL cargo to the pier, it must first obtain a gate pass that allows the truck to enter the premises. On certain full shipperload containers no gate pass is required and at some piers an appointment for delivering freight is necessary. The truck then waits its turn to reach the receiving clerk who then examines the documentation and routes the truck to a checker. The truck is then backed into a receiving bay and unloaded. The amount of LCL cargo that can be handled at a bay depends upon the availability of

[20] The average of $182.33 comes from Consolidated Express's most recent tariff amendments. One fifth of the tariff's amendments were filed the day before the witness testified. While Mr. Fuchs characterized the tariff as meaningless because rates are fixed on a deal-by-deal basis, the rates are nevertheless valid to show what was or at least should have been charged for shipments of the various commodities covered. The "uselessness" of the tariffs because of rates made on a "deal by deal" basis is an interesting proposition in view of the tariff filing requirements of the Shipping Act, 1916, and 1984.

checkers, but the record shows there is no shortage of checkers. The checker signs the necessary documents which are then returned to the receiving clerk who compares the documents with the checker's notations. If the documents are in order, the truck is free to leave the terminal.

The assertions of proponents that delivery of LCL cargo direct to the pier incurs delays, added costs, problems in documentation, increased pilferage, misdeliveries and missed sailings remain just that—assertions. There are no figures on added costs, no example of actual delay, no analysis of the difference in the amount of pilferage or missed sailings, and the testimony on documentation is less than convincing. On the other hand there is an equal lack of evidence on the alleged advantages of stuffing and stripping on pier.

The American Warehousemen's Association also intervened in opposition to the implementation of the Rules. The AWA is an unincorporated trade association with 568 member companies. The basic function of a warehouseman is, as the name implies, the storage of goods. The storage function does not depend upon the origin or destination of the goods, and the warehouseman provides the same space, engages in the same activities, and receives the same fees regardless of the history of the transportation of the goods. Compensation for warehouse services consists of "in" and "out" charges for receipt and delivery and fees for a "minimum" 30 days' storage.[21]

When ocean cargo is stored, warehousemen are not directly involved in transporting the goods. Historically cargo destined to or originating at a warehouse was hauled breakbulk to and from the piers. Containerization did not alter the warehousemen's basic operation. They continued to perform the same services and functions they had in the past. With the advent of containerization, warehousemen began loading and unloading containers. This was not a totally new function since warehousemen had traditionally consolidated and boxed shipments. However, with the adoption of the FAK rate, the warehouseman found himself in the new position of consolidating the goods of a number of dispa-

[21] The goods do not necessarily remain in the warehouse for 30 days, but "for administrative ease," billing for warehouse charges may be on a 30-day basis.

rate shippers in a single container and obtaining a lower rate on the whole than the total freight charges would have been on the individual shipments. The warehousemen could do this as either an NVO or a subcontractor.

Of the 538 members of the AWA only three companies in the Port of Hampton Roads claimed *specific* harm from the Rules.[22] D.D. Jones Transfer and Warehouse Company has been engaged in the local drayage and warehousing of freight since 1927. Jones has had motor carrier operating authority in the commercial zones in and around Norfolk and for the carriage of household goods in North and South Carolina. In 1982 Jones received 48 State Authority. Jones also operates piggyback ramp facilities for the *Norfolk and Western* and *Seaboard Coastline Railroads* and had approximately one million square feet of warehouse facilities at four separate locations. D.D. Jones employs 117 people who drive, load and unload truck trailers and containers, segregate and label cargo, palletize and stock cargo, and perform other warehouse functions. Jones' warehousing service, which includes breaking down crates of merchandise into individual pieces and wrapping and packing items, has not been and couldn't be done on pier by terminal or shipping companies.

The record does not support Jones' assertion that it competes with other warehouses located outside the 50 mile limit in Richmond and Roanoke, Va., and in Charlotte and Raleigh, N.C.

During the 1981 implementation of the Rules, Jones attempted to "book" cargo for Sherwin Williams, Co., but was refused.[23] During January or February of 1981, Sherwin Wiiliams

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[22] Some "inland" warehouses were not affected by the Rules.

[23] Mention should be made here of what the respondents call the "Booking Ploy," a term used by respondents to characterize their objections to any proposed finding of fact based on a witness's statement that he was denied a "booking" for cargo. What would actually happen is that the witness, be it NVO, warehouse, etc., would attempt to arrange for the shipment of a container which he had loaded. In his mind he was attempting to "book" the cargo with the line in question. Respondents deny all such findings with the statement, "No bookings are refused under the Rules. Carriers will accept all cargo brought to the piers." Now this statement is a literal truth. The carriers will accept the cargo, but it is an acceptance conditioned on compliance with the Rules, i.e. a container loaded by a proponent would be refused by the carrier unless it was stripped and restuffed by ILA labor at the pier.

canceled its account with Jones and opened its own private warehouse which was exempt from the 50 Mile Rule. It does not appear from the record that the 50 Mile Rule was the reason for Sherwin Williams' action. Indeed, the amount of planning and preparation involved in such a venture would weigh heavily against such an inference absent corroborative testimony. No witness from Sherwin Williams was called to testify.

After January 2, 1981, all of the approximately 60 ocean carriers in the Port of Hampton Roads that deal with Jones refused to release import containers unless Jones agreed to warehouse the cargo for a minimum of 30 days before releasing it to the consignees. Of course, Jones' option was to have the container stripped on the pier. Then Jones could pick up the cargo and truck it to the warehouse.

After January 2, 1981, all the carriers operating in the Port of Hampton Roads refused to release containers for export to off-pier consolidators. This refusal prohibited Jones from stuffing some 80 containers of appliances on United Arab Lines. Jones was also denied another 30 containers which hampered its ability to meet its previous commitments to a customer.

In one instance Jones was prepared to ship a container of perishable chemical products with United States Lines but was told that the container would have to be stripped and restuffed on the pier by the ILA. The particular product involved was unstable at low temperatures and had to be protected from freezing at 32° Fahrenheit. Jones called United States Lines after the cargo had been accepted to find out whether it had terminal facilities to store the container which would protect the cargo from freezing while it was being stripped and restuffed. Jones learned that United States Lines had no such facilities and that no precautions had been taken to protect the cargo. The record does not show if the cargo was damaged as a result.[24]

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[24] The severity of this kind of problem depends, of course, upon the existence of a real danger of the cargo freezing during the stripping and restuffing. Moreover, Jones appeared concerned about facilities to store the container while it was at the terminal which could imply that the container itself was temperature sensitive, yet Jones admitted that no controls whatever existed during the voyage itself which depending upon the trade could produce freezing temperatures.

For reasons not made clear on the record, Jones obtained permission from an ILA steamship committee to receive and load containers for two of its customers J.C. Penney and Gibson International.

Jones asserts that his average gross revenues are approximately $6,000,000.00 per year, and estimates if the 50 Mile Rule remains in effect. Jones would lose one-third of those gross sales. This projection does not withstand analysis.[25]

Southgate Corporation, d/b/a Southgate Trucking and Southgate Terminal Warehouse Company, provides storage, distribution and trucking services and customs bonded storage operating from facilities located in Norfolk, Va., within 50 miles of the Port of Hampton Roads. Southgate has been in the public warehouse business since 1892.

In 1980 Southgate stripped 584 containers and stuffed 4,375 while in 1981 it stripped 413 and stuffed 3,667. Sometime during the period January/February, 1981, Union Carbide one of Southgates's clients left Southgate only to return in March 1981. During January and February the ILA refused to release two containers of matches to Southgate because it allegedly could not prove that the cargo would be warehoused for 30 days. Southgate presented no figures on revenue loss, actual or projected.

The Norfolk Warehouse Co., Inc., has been engaged in the public warehouse business in Norfolk, Va., since 1967. The Company provides warehousing, stuffing and stripping, and a number of other services for its customers. Norfolk estimates a loss of $350,000 in gross revenue a year if the Rules were applied. However, this is a figure derived by talking to some of the customers about what they would have shipped with NWC had the Rules not been in effect and projected this over a year's period. This "meth-

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[25]This testimony is unreliable on several counts. In his written direct testimony Mr. McNeil, speaking for Jones stated that the gross revenues are derived on the basis of 41% from trucking operations, 18% from storage and 31% from "handling . . . which is mostly stuffing and stripping." Just what part of this 31% is represented by "mostly" is nowhere explained. Additionally not all the estimated gross revenue is derived from import-export cargo—40% of it comes from domestic operations not affected by the Rules. Finally, 80% of the revenue derived from the export-import cargo of Jones' six largest customers derives from the handling of full shipperloads which are not subject to the Rules. In short the record does not permit anything like a precise projection of loss.

odology"does not produce a figure upon which any reliance can be placed. However, during January and February Moore McCormack Lines, U.S. Lines, Barber Blue Sea, Sea-Land, and ACC refused NWC a total of about 25 containers. During this same period, Burlington Industries a customer of NWC stuffed containers for export at their own plants. But, here again these members are without any meaningful context. There is no way to use them in any gauge of the impact of the Rules.

The American Trucking Associations, Inc., intervened on behalf of its constituent members which are state trade associations representing trucking companies engaged in interstate motor carrier operations within the state association's geographical area. Prior to containerization, truckers picked up LCL shipments and trucked them to the piers where they were unloaded and prepared for ocean transport by dockworkers. On import movements, truckers picked up the cargo breakbulk from the piers and delivered it to the consignees. Compensation for these services consisted of the inland freight charges assessed. With the development of containerization, truckers continued to perform the same services and functions they had in the past. They are still responsible for the overland transportation of the cargo. This function is basically the same whether the cargo is carried in a container or breakbulk in the van of the truck.

Containerization enabled truckers to branch off into a new function involving the loading and unloading of marine containers. The trucker can do this either by becoming an NVO or it may simply provide the container loading and unloading service as a subcontractor for an NVO, etc. The ATA claims 13,359 motor carrier members of which it is asserted 1,190 are engaged in the transport of ocean containers. Of these latter only five claimed that they would be "adversely affected" by the Rules. Since these claims are unsupported by any hard evidence of the nature or degree of the anticipated harm, they can be given no weight.[28]

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[28]The proposed finding relating to truckers is that five named truckers "presently stuff and strip containers, or would do so upon request and would be adversely affected by the [Rules]." If it were not for the apparent seriousness with which the finding was proposed, it would be unnecessary to even mention it.

The International Longshoremen's Association, AFL-CIO is the collective bargaining representative for dockworkers employed in ports from Maine to Texas. Today's dockworker gets $14.00 an hour plus $10.00 in fringe benefits. The cost to the steamship line for a longshoreman's salary plus fringe benefits for hospitalization, welfare and pension is between $40,000 and $45,000 a year for a 40-hour week. The ILA membership also receives payment under Guaranteed Annual Income (GAI), container royalty payments and the Job Security Program. Longshoremen receive six weeks' vacation, 16 paid holidays and $25,000 of life insurance.

Under the Guaranteed Annual Income program an unemployed ILA worker gets paid $35,000 a year with six weeks' vacation and fringe benefits. However, GAI benefits are not uniform and payments at Southern ports are lower.

The steamship lines pay a container royalty of $3.00 a ton on containers not stuffed or stripped by the ILA such as manufacturers label, those of qualified shippers and containers with origins or destinations outside the 50 mile limit. Two out of every three of the container royalty dollars go to Christmas bonuses which in New York were between $1,500 to $1,800 per person.

In the Port of New York in 1958, 31,500 longshoremen worked approximately 43 million hours, handling 12 million tons of cargo with an average productivity of about .3 tons of cargo per man-hour. At the present time there are approximately 13.7 million man-hours of work required to move about 22 million tons of cargo, an increase in productivity per man-hour of almost 600%. The biggest single factor in the increased productivity was, of course, containerization. That containerization has cost the ILA jobs and man-hours is clear. A lot less clear, however, is the extent to which other factors such as the decline in passenger traffic or the alleged failure of New York to maintain its "market share" have contributed to these losses.

The failure of New York to retain its market share is predicated upon the amount of general cargo handled at New York as compared to the amount of general cargo at other ports. Yet the economist upon whose testimony the alleged decline in market share is based admits that the definition of general cargo varies

from port to port, *i.e.* what kinds of cargo are included in the category of general cargo. The market share will depend upon or be affected by the particular definition used. Additionally the amount or number of man-hours required to handle a given number of tons will depend upon the "mix" of cargo included within the general cargo category, i.e. whether the mix has a high degree of "labor intensive" cargo or "capital intensive" cargo.[27] To attribute the loss of over 15 million man-hours at New York to the decline in passenger traffic would require a finding that each of the 511,000 lost passengers was the beneficiary of 30 hours of longshore work, an untenable proposition indeed. The shift of cargo out of New York to other East Coast ports undoubtedly contributed to a loss of man-hours at New York, but on the record here containerization was by far the major cause of lost longshoremen man-hours.

Discussion and Conclusions

The basic issue is easily stated: Were the Rules lawful under the Shipping Act, 1916, and are they lawful under the Shipping Act, 1984? It is considerably less than easy to find the proper role of "labor policy considerations" in the resolution of this basic issue—the legality under the shipping statutes of carrier practices generated by collective bargaining agreements. The context in which the question arose is crucial.

The Commission considered the validity of a 50-Mile Rule in June of 1978 in the case *Sea-Land Service Inc.-Proposed Rules on Containers*, 21 F.M.C. 1 (1978).[28] The Commission found the Rule, which was essentially the same as the one at issue here, in violation of sections 14 Fourth, 16 First and 18(a) of the Shipping Act, 1916; and of Section 4 of the Intercoastal Shipping Act, 1933, in that they were unfair, unjustly discriminatory, unduly prejudicial and unreasonable. The respondents had argued that because the Rules were the result of collective bargaining they were not

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[27] In the jargon "labor intensive" as used here means "It takes a lot of labor to load it." "Capital" as in "capital intensive" refers to machines, presumably forklifts, etc.

[28] Actually there were two dockets, 73-17, *Sea-Land* and 74-40, *Puerto Rico Maritime Shipping Authority-Proposed Rules on Containers*, 21 F.M.C. 1 (1978), which were consolidated. Unless stated otherwise, the use of *Sea-Land* refers to both dockets.

unfair, unreasonable, unjustly discriminatory or unduly prejudicial. The Commission said that while it might agree that the collective bargaining agreement was a factor to be considered, it did not preempt other more significant factors which rendered the Rules unlawful. The Commission was afraid that if it adopted respondents' contentions, a common carrier by water could escape the Commission's jurisdiction simply by entering into a collective bargaining agreement which obligated the common carrier to take actions in violation of the Shipping Act, 1916. Under respondents' theory, as understood by the Commission, the bargaining agreement would then sanction the violations and remove them from Shipping Act cognizance. The Commission said, "We do not view the National Labor Relations Act as permitting a common carrier to disregard entirely its statutory obligations when conducting and resolving labor/management negotiations."

The decision of the Commission in *Sea-Land* was appealed and that appeal was pending when the Commission undertook this investigation in February of 1981. As originally structured, this proceeding was limited to affidavits of fact and memoranda of law. However, in February of 1982, the Commission issued an Interim Report and Order in which it found that while the Rules were within its jurisdiction, there was a need for further evidence on the merits of the Rules themselves. For present purposes, the important feature of the interim order was the sentence:

> Because the Commission has today ruled that the Container Rules are not exempt from Shipping Act regulation, despite their inclusion in ILA collective bargaining agreements, no further evidence regarding labor conditions, shall be accepted by the Presiding Officer.
>
> If the respondents have a defense to the Shipping Act violations alleged in the Order of Investigation, it must be a defense relating to transportation conditions, not labor relations policy.[29]

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[29] At this point it seems to me that the Commission viewed labor relations policy or evidence of labor conditions as having a role only in determining jurisdiction over the practice (agreement?) in question or in granting a so-called "labor exemption" to the particular practice or agreement.

About a month after the issuance of the Interim Report and Order, the Court of Appeals for the District of Columbia Circuit in *CONASA* v. *FMC*, 627 F. 2d 171 (D.C. Cir. 1981), decided the appeal in the *Sea-Land* case. The Court rejected the challenge to the Commission's jurisdiction over the Rules but remanded the case for reconsideration on the merits. Two Supreme Court decisions which the Court of Appeals thought had some bearing on the issues presented in *Sea-Land* had been handed down after the Commission's decision had been served. The Court felt that "the interests of justice, required that the FMC should have the opportunity to reconsider its previous determination in the light of" *FMC* v. *Pacific Maritime Assn.*, 435 U.S. 57 (1978) (*PMA*) "which asserts the importance of labor policy in reaching substantive shipping law decisions" and *NLRB* v. *International Longshoremen's Assn.*, 447 U.S. 490 (1980), "which discusses the role of collective bargaining in resolving the problems created by technological job displacement."

After the reconsideration ordered by the Court, the Commission issued a "Report and Order on Remand" in which it reaffirmed its earlier decision and vacated the proceedings. In reaffirming its decision, the Commission read the *PMA* and *ILA* cases as saying nothing which would require a decision different from the one already reached. The Commission said it had in fact complied with *PMA* and *ILA* by taking labor concerns into account throughout the proceeding. The Commission dismissed the proceedings in Sea-Land because they concerned a collective bargaining agreement no longer in effect and because the Commission was now engaged "in a broad scale proceeding" (this case) examining the lawfulness of the 50-Mile Rule under the present bargaining agreement. The Court of Appeals vacated the dismissal and ordered the Commission:

> . . . to defer further action in its Dockets 73-17 and 74-40 until it has reached its final decision in its Docket 81-11 and until the Supreme Court has concluded its action [on the petition for certiorari in *CONASA*].

Finally, in an order which was served the same day as the Report and Order on Remand, the Commission amended the Interim Report and Order in this case. It deleted the prohibition

against the receipt of evidence on labor relations policy in this proceeding and in its place put the following:

> . . . the parties may present evidence and otherwise address the nature and extent of any labor policy consideration which might affect the lawfulness of the Container Rules under the sections of the Shipping Act here at issue and the remedy to be applied for any violations of such sections.

The question now, of course, is just where does all of this leave us? One thing is clear, the Court of Appeals was unhappy with the Commissions treatment of the so-called labor issue in *Sea-Land*. The Court did not, however, give even the slightest hint as to just what it was in the Commission's handling of th issue that caused it concern. A closer look at the *Sea-Land* decision is called for.

In the initial decision which the Commission adopted, the Rule was found to be unlawful because it was unfair, prejudicial and discriminatory within the meaning of sections 14, 16 and 18(a) of the 1916 Act. Two "fundamental truths" were cited as grounds for the decision. The first, was that all shippers should be treated substantially equally if they are asking for and receiving the same transportation service. The second was that the FMC had jurisdiction over tariffs of ocean common carriers in the U.S./Puerto Rican trade. The Presiding Officer said:

> Keeping the above two fundamentals in mind, the FMC clearly has jurisdiction over the lawfulness of PRMSA's tariff rules in the Puerto Rican trade. Secondly, if the tariff rules provide for grossly unequal treatment of similarly situated shippers, the rules are clearly unlawful under the Shipping Act. Furthermore, if one shipper receives preferred treatment and another shipper is subjected to unfair, unjust and grossly discriminatory treatment, such treatment is clearly unlawful when for the same transportation, *despite any reason leading to the discriminatory treatment.*
>
> In other plainer words, unlawful tariff rule discrimination is unlawful tariff rule discrimination, *regardless of the fact that it may have been caused by a work preservation rule, and it*

matters not at all whether the work preservation rule is lawful in and of itself. (21 F.M.C. at 29.) (Emphasis mine.)

All the respondent's precedents dealing "directly or peripherally" with section 15 agreements were rejected as "not really in point" and of only "some background interest." There follows, however, an extended discussion of certain of these cases[30] which leads to the conclusion that (1) the precedent is irrelevant because there is no agreement involved; or (2) the "tariff rules on containers . . . are a shipping matter subject to shipping laws, and separate from any labor matter and any labor laws," or (3) even "if one were to conclude that [the]rules on containers are partly a shipping matter and partly a labor matter one still must conclude that the shipping part is of such importance that it is not immunized from the shipping laws." As the Presiding Officer made clear, since there was no argument involved, these principles were not a part of the basic rationale or ground of the decision. However, reliance was clearly placed on *South Atlantic and Caribbean Line, Inc.*, 12 F.M.C. 237 (1969), in which the carrier attempted to "embargo" certain cargo which had not been stuffed or stripped by the ILA. The *SACL* case was found to present "substantially similar, if not the same, legal implications as the matter now at issue." Since all the other cases cited by respondents were rejected, distinguished, found irrelevant or found to be of background interest only, the SACL case provided the sole precedential underpinning for the initial decision.

On exceptions to that decision, the Commission thought the *SACL* case deserved special attention saying, "We wish, once and for all, to put to rest any attempt to apply the holding in that case to the rule at issue here." The Commission found that the only two issues presented in SACL were (1) Did SACL's actions constitute a true embargo, and (2) did SACL's "Embargo Notice" comply with section 2 of the Intercoastal Shipping Act? The resolution of those two issues the Commission concluded was irrelevant to the questions presented in *Sea-Land*.

The Commission then considered the respondent's argument that "the longshore services and the underlying collective

[30] The primary cases were *Volkswagenwerk* v. *FMC*, 390 U.S. 261 (1968); *United Stevedoring Corp.* v. *Boston Shipper Assoc.*, 16 F.M.C. 7 (1972); *NYSA* v. *FMC*, 495 F. 2d 1215 (2d Cir. 1974).

bargaining agreement which regulates them are transportation factors which must be considered with regard to the alleged violation of sections 14 and 16." The Commission rejected this contention as "novel" and an argument that was "circular." It refused to accept "the proposition that the factors which created the uneven treatment also justify such treatment." The Commission found this "ingenious but unconvincing."[31] (21 F.M.C. at 4.) This rejection respondent's argument as "circular" requires the conclusion that the underlying collective bargaining agreement which created the uneven treatment *cannot ever* provide justification for discriminatory treatment of shippers. Notwithstanding this, the Commission goes on to say:

> . . . we agree with the presiding officer that the existence or not of a collective bargaining agreement which *affects* but is not *a part of* the transportation aspects of a shipper's relationship with his carrier, need not be given overwhelming priority or weight as a transportation factor by which to justify dissimilarity of treatment.

There are at least three difficulties presented by this double-barreled approach. First it contains an internal inconsistency, if not contradiction—either the collective bargaining agreement cannot justify disparate treatment or it is a factor which when considered can justify it. Second, the Commission is agreeing with something the Presiding Officer did not say. What he did say was that unlawful tariff rule discrimination was unlawful "regardless of the fact that it may have been caused by a work preservation rule and it matters not at all whether the work preservation rule is lawful in and of itself." (21 F.M.C. at 29.) Finally I do not know what is meant by an agreement which "affects but is not a part of" the shipper's relationship with a carrier.

The Commission ultimately concluded that "upon consideration of the transportation factors in the situation created by

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[31] The Commission's condemnation of the argument is an unfortunate confusion of cause with effect. The cause of the discriminatory conduct is the work preservation effort by the ILA and its effect is the impact on the NVO's of container practices of the carriers. The clear implication of the Commission's reasoning is that discrimination can never be justified no matter what conditions may have caused it. This writes terms such as "unjust," "unreasonable," and "undue" out of the statute.

these rules, including the underlying ILA-CONASA agreement, the disparity of treatment under the rule is not justified." (21 F.M.C. at 4.) It was this disposition of the merits of the case that the Court of Appeals felt should be reconsidered in the interest of justice.

In its Report and Order on Remand, the commission further explained its rationale. The Commission said that it had "applied the teachings of ILA and PMA" to the record in *Sea-Land* and the Commission was "convinced that neither required any changes in the substantive scope of our earlier determinations made under the shipping statutes." The Commission concluded that the only significance of *ILA* was that a decision by the Supreme Court outlawing the rules would have obviated the necessity of continuing with the Shipping Act proceedings. The Commission found that *PMA* was consistent with and fortified the decision in *NYSA* v. *FMC*, 495 F. 2d 1215 (2d Cir.), *cert. denied*, 419 U.S. 964 (1974), a case which was well known to and considered by the Commission at the time it decided *Sea-Land*. Thus, *PMA* did not "dictate a different result than that which flowed from the parallel reasoning of *New York Shipping Association*." The Commission stated that it "gave consideration to the role the collective bargaining process had played in resolving the problems created by technological job displacement" and had "been sensitive to labor policy in reaching its decision," but nevertheless the rules "violated common carrier obligations which [were] at the very heart of the Commission's regulatory responsibilities." The Commission said:

> The Commission complied with the considerations reflected in *ILA* and *PMA* by taking labor concerns into account throughout these proceedings. Although recognizing the importance of the "50-mile rule" to the union's claim of work preservation, the Commission ultimately relied upon the critical line of cases holding that a common carrier's duty to adhere to its tariffs is "almost an absolute one . . ." and that " . . . a common carrier may not bargain away its statutory obligations to the public and thereby relieve itself of such obligations." *Galveston Truck Line Corp.* v. *Ada Motor Lines, Inc.*, 73 M.C.C. 617, 626 (1957).

The critical line of cases referred to was set out in a footnote to the above quote. The footnote reads:

> There must be a strong "justification" for practices which deviate from statutory obligations, the onus of which is on the carrier (*Carpenters' Union* v. *Labor Board*, 357 U.S. 93, 110 (1958), and for such justification there must be "compelling considerations." *Carpenters' Union* v. *Labor Board*, 357 U.S., *supra*, at 109.) In general, "hot cargo" clauses of the type here in issue in collective bargaining agreements have been recognized as insufficient to justify a carrier's refusal to carry out its tariff obligations. See *Burlington Truck Lines* v. *U.S.*, 371 U.S. 156 (1962); *Carpenters' Union* v. *Labor Board*, 357 U.S. *supra*, at 109-111; *Merchandise Warehouse Co.* v. *ABC Freight For. Corp.*, 165 F. Supp. 67, 75 (S.D. Ind. 1958); *Galveston Truck Line Corp.* v. *Ada Motor Lines, Inc.*, 73 M.C.C., *supra*, at 625-630. In fact, even "peaceful picket lines coupled with union contractual provisions acquiesced in by the carriers" have been held not to excuse the carrier's obligation or to permit it to interfere with the rights of persons not parties to collective bargaining agreements. See e.g., *Pickup and Delivery Restrictions, California, Rail*, 303 I.C.C. 579, 594 (1958). A strike by a carrier's own employees does not completely relieve it of its obligations under transportation law. *Railway Employees* v. *Florida E.C.R. Co.*, 384 U.S. 238, 244-245 (1966). A carrier must not refuse service to a particular shipper at the risk of a total labor shutdown forcing it out of business. See *Montgomery Ward & Co.* v. *Northern Pacific Term. Co.*, 128 F. Supp. 475, 518 (D.C. Ore. 1953). (Report and Order on Remand, served May 19, 1982, footnote 22 at page 10.)

The principals drawn from the cases cited by the Commission are either so general as to be virtually valueless or they are specific instances of particular conduct found unlawful under other statutes or law which are not really analogous to the Shipping Act. To begin with the latter, the *Montgomery Ward* case is said to stand for the proposition that a carrier cannot refuse service to a shipper even at the risk of being forced out of business. Presumably it is cited as an illustration of a similar duty imposed by the Shipping Act. However, that case was decided under

either the "federal common law" or the common law of the State of Oregon. The opinion is less than clear as to which common law of the State of Oregon. The opinion is less than clear as to which common law is the ground for the holding. It may be both. In any event, it is of no precedential value for the Commission when deciding cases under the Shipping Act, 1916 which does not incorporate by reference or otherwise the full range of common law offenses.[32]Similarly, the proposition that "a strike by a carrier's own employees does not completely relieve it of its obligation under transportation law," deals in fact with a railroad's obligations under the Railway Labor Act (45 U.S.C. § 156 1964 Ed.). In *Railway Clerks* v. *Florida E.C.R. Co.*, 384 U.S. 238 (1966), a 25-cent-per-hour wage increase demand led to a strike which in turn raised the question of the limits of the railroad's"self-help" rights under the Railway Labor Act and the collective bargaining agreement. The specific question was the extent to which a carrier could depart from the bargaining agreement in making new terms and conditions for its emergency labor force and still remain within the confines of the Railway Labor Act. The railroad's obligation to exert reasonable efforts to maintain its service to the public entered the case only as a factor in determining how far the railroad could go exercising its right to self-help.

General propositions such as the need for a "strong justification" for deviations from statutory obligations, and that "compelling considerations" must support those "strong justifications," are meaningless generalizations unless and until they are applied to concrete situations.[33] *Galveston Truck Line Corp.* v. *Ada Motor Lines Inc.*, 73 M.C.C. 617 (1957), appears to be the main precedent upon which the Commission relies. In *Galveston* the complaint alleged that the refusal of some motor carriers (respondents) to accept shipments from complainant violated (1) the carrier's common law obligations, (2) the provisions of the

[32] The Commission is not the proper forum for trying common law cases. Its jurisdiction is limited to the offenses set forth in the statutes it administers.

[33] The proposition that there must be a strong justification for practices which deviate from statutory obligations is said to come from page 110 of the Court's decision in *Carpenters Union* v. *Labor Board*, 357 U.S. 93. Neither the proposition itself nor anything from which the proposition could reasonably be formulated appears on that page.

Interstate Commerce Act, (3) the specific provisions of the operating authorities, and (4) the provisions of their published tariffs. The refusal of the defendants to accept shipments stemmed from a labor dispute between the union and complainant. As part of its efforts to pressure complainant, the union approached respondents and invoked a clause in the bargaining contract which required respondents to refuse to deal with another employer declared "unfair" by the union. The refusal to accept complainant's shipments was found unlawful under section 216 of the Commerce Act and a provision of the certificates of public convenience and necessity under which the respondents operated. Section 216 (b) provides:

> It shall be the duty of every common carrier of property by motor vehicle *to provide safe and adequate service*, equipment, and facilities for the transportation of property in interstate commerce; to observe and enforce just and reasonable rates, charges and classifications, and just and reasonable regulations and practices relating thereto.[34] (Emphasis mine.)

The certificates of convenience and necessity held by all the respondents except one had the following provision:

> It is further ordered and is made a condition of this certificate that *the holder shall render reasonably continuous and adequate service to the public* in pursuance of the authority granted and that failure to do so shall constitute sufficient grounds for suspension, change or revocation of this certificate. (Emphasis mine.)

A careful reading of the decision shows that the ICC grounded its finding of violation on the failure of the respondents to carry out their duties within the scope of their "holding out." But the *Galveston* case is at best of dubious value because of the specific provisions of both the Commerce Act and the certificates that the carriers provide safe, adequate, and reasonably continuous service. No affirmative obligation to maintain "adequate" or "reasonably continuous" service is placed upon carri-

[34] Section 216 (c) also quoted by the ICC authorizes carriers to establish through routes and joint rates with other carriers and if they did so, they had to establish just and reasonable practices, etc. in connection with them.

ers to the Shipping Act. Indeed, within the limitations imposed by the Act the ocean carrier can structure and condition his service as he sees fit. Having thus explained its decision, the Commission dismissed the proceedings.

Several problems are raised by this analysis. First, the Commission adopted the initial decision which found that the fundamental obligation which the 50-mile rule forced the carriers to abrogate was the duty to treat "all shippers . . . substantially equally, provided they seek and receive the same ocean transportation service from the same carrier." Moreover the fact that the unequal treatment of shippers "may have been caused by a work preservation rule" does not justify that treatment. (See 21 F.M.C. at 29.) Yet, notwithstanding this statement, the Commission goes on to say that it agrees with the Presiding Officer that a collective bargaining is a factor to be considered in judging conduct by carriers which allegedly violates the Shipping Act. At this point the 50-mile rule violates the Shipping Act because it requires disparate treatment of similarly situated shippers and is not justified by the presence of a collective bargaining agreement. However, in the Report and Order on Remand, the ground seems to shift slightly to the "almost absolute" duty of a common carrier to adhere to its tariffs. I suppose the obvious answer is that both obligations are at stake here.

The basic proposition, then, is that the 50-mile rule unlawfully interferes with the fundamental obligations of carriers to adhere to their tariffs and to treat similarly situated shippers alike; and the fact that the unlawful conduct arises from a collective bargaining agreement does not justify that conduct.[36] Conceptually this is unobjectionable. As a disembodied proposition it cannot be argued against nor can it be defended. The essential element to render the proposition a reasonable rationale for the Commission holding in *Sea-Land* is missing. There is no explanation of the "why." No attention is paid to why the labor considerations are insufficient to justify the carrier's conduct and thus legitimize it. There are no specifics, only generalities. It is not

[36] This proposition is never specifically stated by the Commission, but is gleaned from the general statements of the Commission in the *Sea-Land* opinion and the Report and Order on Remand.

enough to say only that labor considerations are outweighed by the carrier's fundamental statutory obligations. An explanation of the test used to make that determination is required. It is here that I think the court of Appeals had its difficulties with the Commission's decision. In my opinion the purpose of the remand was as much to afford the Commission an opportunity to explain the methodology used to conclude that the transportation factors outweighed the labor considerations as it was to allow reconsideration in the light of *ILA* and *PMA*. By vacating the Commission's order dismissing *Sea-Land*, the Court indicated that it was still not satisfied by the explanation offered in the Report and Order on Remand. What is needed then is to establish a methodology or criteria to be used in reconciling "labor policy" with the requirements of the shipping statutes. As stated by Mr. Justice Harlan in *Volkswagen*,[38] the problem begins with the very existence of multi-employer bargaining agreements, "Multi-employer bargaining must . . . be reconciled with the sometimes competing policies of federal laws promoting and regulating competition, viz., the antitrust laws and in the case of maritime labor relations, the Shipping Act. . . . It is a problem of line drawing."

This problem of "line drawing" is not a new one for the Commission. It was faced in *United Stevedoring Corp.*v. *Boston shipping Assoc.*, 16 F.M.C. 13 (1972), where the Commission fashioned the criteria for determining whether an agreement otherwise subject to section 15 of the Shipping Act was entitled to a labor exemption from the section's requirements. There a review of certain leading Supreme Court cases led the Commission to adopt the following criteria for determining whether an agreement would be "labor exempt" from the requirements of section 15:

1. The collective bargaining which gives rise to the activity in question must be in good faith.

2. The matter is a mandatory subject of bargaining . . . [and] must be a proper subject of union concern. . . .

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[38] *Volkswagenwerk* v. *FMC*, 390 U.S. at 284.

3. The result of the collective bargaining does not impose terms on entities outside of the collective bargaining group.

4. The union is not acting at the behest of or in combination with non labor groups, i.e., there is no conspiracy between labor and management.

Three of these criteria are a good starting point for the analysis of any carrier practice which is the product of collective bargaining and which is said to violate the shipping laws. That the bargaining was in good faith over a matter of legitimate concern to the union and not tainted by a conspiracy between labor and management are all proper areas of inquiry in cases where "labor considerations" are said to justify a carrier's practices. Of course, the inquiry may be unnecessary where, as here, the National Labor Relations Board or the Courts have already found the activity proper under the labor laws. But just as these criteria were relevant to a finding that an agreement is entitled to a labor exemption from section 15 of the Shipping Act, 1916, they are relevant to a judgment that a carrier's activity which might violate the shipping statutes is "justified" by "labor policy considerations." The absence of a legitimate union concern or the presence of a labor-management conspiracy would preclude the justification of proscribed activity by any labor considerations. The third criterion, the impact upon third parties, serves a purpose here somewhat different from its role in determining labor exemptions. It is precisely the impact upon third parties that I propose as the test for determining whether a particular practice that would otherwise violate the shipping statutes is rendered lawful by labor policy considerations. However, before this is done it is necessary to place the "fundamental obligations" cited by the Commission into the statutory framework of the Shipping Act, 1916.[37]

The first of these is the "almost absolute duty of the carrier to adhere to its tariff. The precise role of this duty is less than clear and it produces a seeming paradox. To begin with, there is

[37] Of course, it is no surprise that proponents' arguments against the Rules are firmly rooted in the Commission's *Sea-Land* decisions. This makes necessary the perhaps overly long analysis of the Commission's grounds in *Sea-Land.*

nowhere in the Commission's discussion of this duty any reference to a specific tariff provision to which the respondents did not adhere.[38] I can only assume that the tariff is viewed as some sort of obligatory "holding out" which embodies or incorporates common some law principle which is somehow violated by the Rules.[39] But this simply begs the question of why the "holding out" may not be qualified in the way provided for in the Rules. There are innumerable other qualifications in the average tariff ranging from volume rates to the handling of dangerous cargoes. If the qualification provided in the rules is a qualitatively different one, that difference needs to be spelled out and its infirmities specified.[40] In any event if the almost absolute duty to adhere to tariffs is meant to be substantive obligation separate and apart from the specific provisions of the Shipping Act, the Commission is without jurisdiction to adjudicate it. If it is meant only as some sort of summation of the specific offenses set out in the Shipping Act, it can only be violated if the specific prohibitions are violated. Finally, no one has shown the specific way in which the respondents have failed to adhere to their tariffs.

The second fundamental obligation would appear to be that of treating alike all shippers who seek and receive the same transportation service. This is but a generalization of the specific prohibitions against unjust discrimination and undue prejudice, etc. If the Rules are to be found unlawful, it must be under the specific

[38] Since the relevant portions of the rules appear in the respondents tariffs, the question of adherence to the tariff cannot refer to adherence to the rules themselves.

[39] One brief argues that the Commission's "mandate" under the Shipping Act, 1916 "is rooted in the early common law obligation to provide services" to "all customers without discrimination" and "consequently the transportation of goods on an indiscriminate basis is the essential element embodied in sections 14 Fourth, 16 First, 17 and 18(a) of the Shipping Act." This argument would engraft an affirmative obligation on the essentially negative prohibitions of the statute. But more importantly it ignores the vital qualifiers such as unjust and undue which are attached to the substantive prohibitions of discrimination and prejudice. Whatever the duties of a carrier may have been under "the early common law" insofar as the Commission's "mandate" is concerned the duties are those which are imposed by the Shipping Act. Violations of the common law are for the Courts.

[40] The difference is not apparently that between a transportation factor and a non-transportation factor. See *Sea-Land*, 21 FMC at 4, where the Commission refers to the "collective bargaining agreement" as a "transportation factor" which "need not be given overwhelming priority or weight. . . ."

provisions of the Shipping Act and it is under those specific provisions that any consideration of labor policy as a justification for the Rule must be had. Specifically the Rules in order to survive must be freed by labor considerations of the charges (1) that they unfairly treat or unjustly discriminate against shippers in the matter of space accommodations or other facilities under section 14 Fourth; (2) that they unduly or unreasonably prejudice or disadvantage certain shippers in violation of section 16 first; (3) that they impose rates, fares or charges which are unjustly discriminatory as between shippers and constitute unjust and unreasonable regulations and practices relating to or connected with the receiving, handling, storing or delivering of property under section 17; and (4) constitute unreasonable rates, fares, charges or practices for the receiving, handling, storing or delivering of property in violation of 18(a) of the Shipping Act, 1916.[41]

Generally the prohibition against undue prejudice and unjust discrimination is designed to prevent arbitrarily conferred commercial advantages at the expense of others equally deserving of the same advantages. Such an arbitrary advantage in ocean freight rates for instance can allow the preferred exporter to enter the overseas marketplace with a price advantage over another exporter not so favored (prejudiced) by the carrier. The evil of prejudice and discrimination in the commercial world is the real harm it does to the businesses of those prejudiced or discriminated against. Since the prevention of arbitrary commercial injury is at the heart of the Shipping Act's prohibitions against unjust discrimination and the like, should not that injury be taken into account in any attempt to reconcile labor law policy with the policy of the shipping statutes? I think it must.

The Commission's approach to the problem, say respondents, put labor policy considerations in the role "of an affirmative defense of the 'indefensible'." Under it the Commission first weighed the rules under the shipping statutes with no regard to labor considerations and found them unlawful. The Commission then considered the labor factors and found that "no labor factors can possibly justify shipping law violations because a com-

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[41] Section 18(a) applies to the offshore domestic commerce while section 17 applies to foreign commerce.

mon carrier cannot bargain away its shipping law duties."[42] As a methodology, it seems to me that this approach is unobjectionable and I suspect the respondents' problem with it lies in the "weight" the Commission gave, or rather failed to give to the labor considerations. It is not necessary to discard this approach; it is only necessary to alter it slightly.

The inquiry almost has to begin with the question of whether the particular activity is in fact, unreasonable, prejudicial or discriminatory. If it is, the next question becomes whether the activity is justified by any of the traditional transportation factors held to excuse the activity. If such factors are not present, then the activity can be found unreasonable, *unduly* prejudicial or *unjustly* discriminatory and violative of the Act, unless the activity is said to be excused by labor considerations, i.e., is the result of a collective bargaining agreement. It is here that the real difficulty begins. The problem of "line drawing" presents itself. On the one hand the ILA considers the 50-mile rule as eminently "just" and necessary to preserve their members very livelihood. While on the other the consolidators view the rule as viciously "unjust" and a threat to the existence of their businesses. Placed between the Scylla of the ILA's cries of their right to "work preservation" and the Charibdis of the consolidator's wails of businesses "devastated" by the "arbitrary" practices of the carriers, the Commission understandably falls back on vague concepts such as "fundamental obligations" which may not be "bargained away."[43] Something a little more specific is required.

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[42] Whether or not this was the precise process used, some credence is lent to the proposition by the Commission's rejection in Sea-Land of the respondents "bargaining agreement" argument as a "novel and . . . circular proposition," in which "CONASA would have us accept the proposition that the factors (longshore services and the bargaining agreement) which created the uneven treatment also sufficiently justify such treatment." (21 F.M.C. at 4.) The fallacy of this rejection is clearly illustrated if you substitute transportation conditions for labor considerations. If transportation conditions "created" a discrimination in rates, than those conditions could not be used to justify the rate—a proposition which if not circular is certainly novel.

[43] Perhaps some of the difficulties are caused by the connotations of righteousness and even morality which seem to surround "just" or "unjust" when applied to labor related conduct. See, for example, the judge's somewhat fevered opinion in *Montgomery Ward & Co.* v. *Northern Pacific Term. Co.*, 128 F. Supp. 475 (D.C. Ore. 1953). A great many other examples could be offered.

Where necessary the inquiry should begin with the validity of the labor considerations said to render the conduct lawful and *Boston Shipping* criteria should be applied, i.e., was the bargaining in good faith over a legitimate labor concern and untainted by any labor management conspiracy. If, as in this case, the validity of the labor considerations has already been established, the need for some criteria to reconcile the conflicting policies presents itself. That criteria should be the degree of harm done to the allegedly affected interest by the activity at issue. Conceptually this may present some difficulties since it appears to make "harm" an essential part of the violation itself. Indeed, this is the position of respondents. Under each of the specific sections, respondents argue that the proponents must show "that the Rules cause injury" in order to establish a violation of that section. At least one proponent, however, takes the position that you can have discrimination without injury citing *North Atlantic Mediterranean Freight Conference*, 11 F.M.C. 202 (1967). The *North Atlantic* case does in fact conclude that no specific commercial injury need be shown in cases involving unjust discrimination in rates under section 17 of the Shipping Act, 1916. The respondents would restrict that proposition to only cases involving rates and argue that here injury is a necessary element of the offense.

Whether harm is an essential element of the traditional case of discrimination where only transportation factors are involved is not presented here. Rather the problem is whether harm can be an element of the labor policy considerations proffered in defense of practices challenged under the shipping laws. I am aware of no generally accepted tenet of law or of any precedent which would preclude its inclusion. The real problem presented by the Rules has always been cast in terms of harm or injury. On the one hand, the ILA maintains that without the Rules, the loss of jobs would have continued unabated. On the other, the proponents' case against the Rules has always been cast in terms of the threat of lost business. The problem reduces itself to one of how far the ILA may go in its work preservation efforts before it impermissibly intrudes upon the rights of proponents to conduct their business free of any discrimination or prejudice resulting from the efforts of the ILA. The answer lies in balancing the harm

done to proponents against the benefits derived by the ILA. This "balance of interest" test is itself not without difficulty.

First, it could result in the condemnation of just those labor practices which are the most effective since in all probability the most effective practices would do the most harm to maritime interests against which the practices are directed. Secondly, future cases may involve a choice which is essentially "social," i.e. which of the two classes of society, business or labor, must bear the brunt of a particular technological innovation.[44]

The proponents have failed to establish on this record that they have suffered any measurable harm because of the Rules. The evidence offered by proponents consists of either generalized speculation, unsupported assertions, or specific claims made in a way which precludes any quantification of actual business losses. They attempt to explain away this lack of evidence by pointing to the limited scope of discovery, the short period of time the Rules were in effect and the lack of implementation by the carriers. Unless the proponents were in some way denied due process, any circumstances contributing to a lack of proof on the part of proponents do not remedy that lack of proof and certainly don't dictate a result different from that based upon the evidence of record. In any event, the alleged limited scope of discovery as a reason for failure to secure evidence is fallacious since the evidence of any harm be found in the proponents' own books and records. On the carrier's asserted lack of implementation the record is insufficient to determine how much if any of the lack of injury was due to the failure of the carriers to implement the Rules. The relatively short period that the Rules were in effect is indeed a circumstance affecting the extent of injury suffered, but the evidence in this record does not even provide a basis for extrapolation. The proponents have failed to demonstrate that the Rules have had any measurable impact upon their various businesses. In this proceeding the burden of proving that the practices of the carriers under the Rules are unlawful falls upon the Commission and all of those opposed to the rules. *Heavy Lift*

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[44] This choice is, of course, present no matter what approach to "justification" is used. It is just more painfully obvious when not disguised by conceptual generalities. This is not the place to decide whether a regulatory agency rather than the Congress should make such choices.

Practices and Charges of Hapag-Lloyd A.G., 21 F.M.C. 637 (1979); *Department of Defense* v. *Matson Navigation Co.*, 20 F.M.C. 24 (1977). They have failed to sustain that burden.

The Interim Order of the Commission placed in issue the validity of the Rules under sections 14 Fourth, 16 First and 17 and 18(a) of the Shipping Act, 1916.

Section 14 Fourth provides:

> No common carrier by water shall, directly or indirectly, in respect to the transportation by water, of passengers or property between a port of a State Territory, District or possession of the United States and any other such port or a port of a foreign country.
>
> Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessels and the available tonnage, (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

The applicable provision of 14 Fourth is the prohibition against unfair treatment or unjust discrimination in the matter of cargo space accommodations or other facilities.

Before dealing with the actual prohibitions of the section, it is necessary to treat the respondents' argument that the various entities compromising the proponents are not shippers and are therefore not entitled to the protection of this section or of sections 17 First paragraph and 18 (a) of the Shipping Act. Respondents first define the term "facility" as the "physical property" used by a carrier to "accomplish the carriage of cargo." Thus, only "cognizable interest" under the section is that of the shipper in having his "cargo transported by sea." According to respondents, "so long as the shipper's cargo is transported, his interest under this section has been realized." Warehouse and truckers freight forwarders and custom house brokers are, under this definition, not shippers because acting as NVO's their real interest is not in the ocean transportation of the cargo. An NVO is not a

shipper when his interest is in obtaining a container for the purpose of "loading/unloading for hire." However ingenious and whatever the merit of its premises, this argument does not overcome the long line of cases which have so defined the term shipper as to include the entities represented by proponents.[46] The proponents are shippers whatever their "interest" and are entitled to the protection of the section if it has been violated by the respondents.

The refusal to release containers to consolidators or to accept them without stripping and restuffing and charges imposed for that service since they are unjustified by transportation conditions, would, without more, violate section 14 Fourth. However, under the balance of interests test, the disparate treatment of proponents embodied in the Rules does not constitute unjust discrimination because the proponents have failed to show that this treatment has resulted in any harm to them. The treatment is not unfair for the same reason. Congress obviously has two different things in mind when it prohibited both "unfair treatment" and "unjust discrimination"; but this difference is obviously in the actions of the carriers and does not dictate a different approach to determining whether the particular treatment is unfair. Since proponents have failed to establish harm, they have not been unfairly treated within the meaning of section 14 Fourth.

Section 16 First provides in relevant part:

> It shall be unlawful for any common carrier by water . . .
>
> First, to make or give any undue or unreasonable preference or advantage to any particular person, locality or description of traffic in any respect whatsoever, or to subject any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

As is so often the case in questions arising under this section, the parties are at odds over the need to establish a competi-

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[46] See e.g., *ICC* v. *Delaware and L. & W.R.R.*, 220 U.S. 235 (1911); *Barringer & Co.* v. *U.S.*, 319 U.S. 1 (1942); *Couzen's Warehouse and Dist. Inc.* v. *Fred Olsen Motor Service*, 544 F. 2d 919 (7th Cir., 1976); *Norman G. Jensen, Inc.* v. *FMC*, 497 F. 2d 1053 (8th Cir. 1974); *Isbrandtsen Co., Inc. et al.* v. *States Marine et al.*, 6 F.M.C. 422 (1961).

tive relationship between those allegedly prejudiced and those allegedly preferred. In *West Indies Fruit Co., et al.* v. *Flota Mercante Co., et al.*, 7 F.M.C. 66 (1962), the Commission said at page 69, "There must be at least two interests involved in any case of preference, prejudice or discrimination, and it is essential that there be established an existing or effective competitive relationship between the two interest." There the competitive relationship was said to be necessary in cases involving discrimination as well as cases involving preference or prejudice, but in *North American Freight Conference*, 11 F.M.C. 202 (1967), the Commission distinguished cases of discrimination from cases of preference and prejudice and held that the competitive relationship was necessary in the latter but not the former. Finally in *Valley Evaporating Co.* v. *Grace Line, Inc.*, 14 F.M.C. 16 (1970), the Commission concluded that even in some cases involving preference and prejudice, it was not necessary to establish the competitive relationship. The respondents insist that the competitive relationship is necessary in this case, while the proponents are just as insistent that it is not, or that if it is necessary it does in fact exist. To some extent, all of the arguments, which will not be repeated here, miss the point.

In *Valley Evaporating* the Commission, in distinguishing the situation presented there, said that while it was essential to establish the competitive relationship where the allegedly preferential or prejudicial conduct, rates, or charges "were geared to transportation factors or the differing characteristic of commodities," it was not necessary "where the carrier's obligation to render a particular service is 'absolute' and not dependent upon such factors or differences." (14 F.M.C. at 21.)

Valley Evaporating was the culmination of a line of cases which began with *Volkswagenwerk* v. *FMC*, 390 U.S. 261 (1968). In *Volkswagen*, the Supreme Court dealt with the Commission's jurisdiction over an agreement designed to raise money through assessments on cargo for a fund which was to be used for the early retirement or retraining of longshoremen displaced by technological innovation. In answer to the argument that the agreement could not violate section 16 because the requisite competitive relationship has not been established, the Court noted that the Commission had often found violations even in the absence of

competition in cases not involving freight rates, 390 U.S. at 280. In *New York Foreign Freight F & B Association* v. *Federal Maritime Commission*, 337 F. 2d 289, 299 (2d Cir. 1964), the Court had before it the practice of freight forwarders fixing "markups" for services rendered. The markups were added "in random fashion" which bore no relationship to the service rendered or the commodity involved. The Court said:

> . . . Transportation or wharfage charges are dependent upon the particular commodity involved; the cost of shipping or storing bananas, for example, bears no relation to the fee levied for heavy industrial equipment. To find an unlawful discrimination in transportation charges thus quite properly requires a showing of competitive relationship between two shippers who are charged different prices. But forwarders render substantially the same service to all shippers in procuring insurance or arranging cartage; the commodity being shipped has little or nothing to do with the reasonableness of the fee exacted for the forwarder's service. The very practice of charging shippers disguised markups of widely varying amounts on substantially identical services without justification, seems to us to be prima facie discriminatory in a regulated industry.

The Court found that the practice in question violated section 16 First notwithstanding the absence of any competitive relationship. In *Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525 (1966), San Diego's practice of granting 30 days free time was challenged under section 16 First. The practice was defended on the ground that there was no competitive relationship between the shippers or the cargoes involved. After a review of the relevant precedent, the Commission concluded that a competitive relationship was not necessary where free time or the storage of property was involved in the *New York* case, *supra*.

Just as the forwarder's arbitrary markups for services bore no relationship to the nature of the commodity, the free time and storage practices of San Diego were not contingent on or affected by the nature of the commodity involved. Free time and free storage was extended to all cargo on equal terms without regard to

size, shape or any other characteristic. The same was true for storage made available at a flat charge per square foot regardless of what commodity was to be stored. The commission concluded that "in such cases unequal treatment has no place in a regulated industry." To the Commission, " The equality required in situations of this kind is absolute and is not conditioned on such things as competition, proximate cause and the like."

Finally, in *Valley Evaporating, supra,* a conference set out to free its tariff of "paper rates."[48] In doing so, it inadvertently eliminated the commodity rate on dehydrated apples and as a result the complainant was assessed the NOS rate on a shipment which resulted in freight charges more than triple those which would have been assessed under the mistakenly deleted commodity rate. The commission found a violation of section 16 First notwithstanding the failure of complainant to establish a competitive relationship between itself and any other shipper. The key to this finding is in the method used by the conference to cleanse its tariff of paper rates. Each of the lines involved in a given trade were asked to compile a list of the commodities moving on its vessels in "sufficient volume" to warrant retention of a specific commodity rate. These lists were then correlated by the conference secretary. Once the list was compiled, all commodities meeting the sufficient quantity criteria were to retain specific rates while all other commodity rates were to be eliminated. Under the criteria dehydrated apples should have retained a specific commodity rate.

There were two sequences to the process used by the Conference. First there was the determination of what constituted "sufficient volume and it was at this stage that all of the transportation factors and cargo characteristics of the various commodities should have been taken into consideration. The Commission admitted if complainant's attack were on the failure of dried apples to meet the sufficient volume criteria, lack of competition could well have been a defense. But having once established the criteria, the respondents were required to apply them

[48] "Paper rates" were rates for commodities that rarely if ever moved in the trades covered by the tariff.

"in a totally fair and impartial manner." The Commission said at page 22:

> At this point the single question involved was whether a given commodity moved in sufficient volume or not. Questions as to the characteristics inherent in the particular commodity involved were irrelevant as were questions of whether the commodity competed with any other commodity or not. Thus, as we said in *Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525, 547 (1966), the equality of treatment required in situations of this kind "is absolute and not conditioned on such things as competition."

The common thread running through these cases is the total lack of any relationship of the condemned practice to the traditional transportation factors or considerations which would ordinarily justify preferring or prejudicing particular shippers or commodities—factors or considerations most often found in cases of allegedly preferential or prejudicial rates. To return for the moment to the *North Atlantic Mediterranean Freight Conference* case, 11 F.M.C. 202 (1967), and its discussion of section 16 First, there it was pointed out that the prohibitions of the section are aimed at that favoritism by carriers which enables a shipper to reach a market and sell his goods at a lower rate than his competitors. Thus the purpose of the section itself seems to require a competitive relationship between shippers. However, transportation conditions can justify a disparity in rates even between competitive shippers. Conditions or factors such as competition from another carrier at the allegedly preferred point of origin or destination may justify the difference in rates. Other factors such as the convenience of the public, the fair interest of the carrier, the relative quantities of the traffic moved and the relative cost of service to the carrier may work to justify differences in rates. Thus, in what may be called traditional cases of preference or prejudice, the shipper alleges that a competing shipper is allowed to reach a common marketplace with a price advantage because of a preferentially lower rate from the carrier. The carrier then is called upon to support that rate with the transportation conditions and factors upon which it was based. If the carrier fails to do this and the shipper has established a competitive relation-

ship with the preferred shipper, the carrier loses and the shipper wins.

It is in those cases where the practice in question is not based on or related to transportation conditions or factors that the scenario is altered. Thus, in the *New York* case *supra* the forwarder's markups were arbitrary and bore no relation to the nature of the commodity or the conditions of its transportation. In the *San Diego* case, the free time and storage practices were the same for all cargo regardless of the characteristics of particular commodities. And finally, in *Valley Evaporating*, the complainant was harmed by the unequal application of criteria where the inequality was in no way tied to transportation conditions. Thus, the need to establish a competitive relationship in cases under section 16 First is dependent upon the nature of the practice at issue. If the practice, whatever it may be, is said to be based upon transportation factors, then it is necessary that the complaining shipper establish the existence of a competitor.[47] But if the practice is arbitrary or is based on conditions other than those of transportation or the nature of the commodity, it is not necessary to establish a competitive relationship.

The Rules, at issue here have as their sole basis the preservation of work of members of the ILA. They are arbitrary in the sense that the nature of the commodity has no bearing on the application of the rule and the conditions of transportation are at best incidental to the purpose of the rule.[48] The Rules were not promoted by conditions attendant to the transportation of the cargoes affected by them and since they were not, it is unnecessary for the proponents to establish a competitive relationship with shippers outside the 50 mile limit.

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[47] Most often the practice will probable involve rates or charges, but I suppose other practices can and probably will arise that are based upon transportation factors.

[48] While the containerization of the cargo is a condition of transportation and has a direct relationship to freight rates, the actual containerization is important to the respondents only to the extent it preserves the work of loading and unloading the containers to members of the ILA. By its own admission the ILA could have demanded that *all* containers be loaded and unloaded by ILA members. Thus, the Rules are arbitrary in much the same way as the process for the elimination of paper rates in *Valley Evaporating*.

The respondents' differing treatment of consolidators within the 50 mile limit when compared with consolidators outside the 50 mile limit is prejudicial to those within the limit. The respondents differing treatment of proponents and FSL shippers is prejudicial to proponents. Whether it is unduly so is the issue. Since the proponents have failed to establish that they are actually injured by the practice of respondents, the labor considerations present here render the prejudice lawful.

The first paragraph of section 17 makes it unlawful for a common carrier by water to demand, charge or collect any rate, fare or charge which is unjustly discriminatory between shippers or ports. Here again the lack of demonstrated harm to proponents justifies the charges imposed under the rules for restripping and restuffing. In the absence of demonstrated harm, the charges for and the actual stripping and restuffing are justified by the collectively bargained work preservation efforts of the longshoremen.

The second paragraph of section 17 requires that a common carrier or other person subject to the Act:

> establish, observe and enforce reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property.

Since the practices at issue are not justified by transportation factors or by the characteristics of the cargoes involved, the disparate treatment of shippers under those practices would make them unreasonable were it not for the justification provided by the labor considerations present here. Again in the absence of harm to the proponents, the practices are rendered reasonable by the labor policy considerations upon which they are grounded.

Section 18(a) of the Shipping Act provides:

> . . . every common carrier by water in interstate commerce shall establish, observe and enforce just and reasonable rates, fares, charges, classifications and tariffs and just and reasonable regulations and practices relating thereto and to the . . . manner and method of presenting, marking, packing and delivering property for transportation . . . the facilities

for transportation and all other matters relating to or connected with the receiving, handling, transporting, storing or delivering of property.

For the reasons stated under sections 14, 16, and 17 above the Rules do not violate section 18(a).

In referring the case for hearing, the Commission in its Interim Report and Order, served February 5, 1982, posed eight issues for resolution. They are taken seriatim below:

1. Whether, and, if so, exactly how, the present Container Rules differ from the 1974 Rules with specific . . . attention given to:

(a) the phrase "containers owned, leased or used by the carriers . . ." which appears in Container Rule 1(a)(1). A finding should be made as to whether the word "used" includes shipper owned or leased containers, and, if it does not, what its intended meaning is;

(b) the phrase "containers . . . from a single shipper . . . into which the cargo has been loaded (consolidated) by other than its own employees . . ." which appears in Container Rule 1(a)(2). A finding should be made as to whether full containers loaded *by the employees* of a nonvessel operating common carrier, or other person dealing with the ocean carriers as the shipper of said containers, are included in the Container Rules; and

(c) Whether the Container Rules require that the $1,000 per container liquidated damages provided by Rule 7(c) be passed on to the shipper and, if not, whether such a result is likely or possible under the Container Rules . . .

The present or 1980 Rules contain no substantive differences from the 1975 rules. The changes made in the 1980 version of the Rules are as follows: (1) All references to "CONASA" were changed to "Management." This was done to reflect the expansion of the bargaining unit which includes not only CONASA and NYSA but other multi-employer associations on the Atlantic and Gulf Coasts. (2) Rule 8 was changed to allow renegotiation of the Rules on sixty days' notice only in the event that any portion of the

Rules is found "illegal, void or unenforceable." Previously renegotiation could occur on 30 days' notice without condition. (3) Rule 10 was reworded to reaffirm the use to which container royalty payments were to be put and to provide for renegotiation if the royalties cannot be collected.

Containers "used" by the carriers were not intended to include containers owned or leased by shippers. Rule 1(a)(1) provides in relevant part:

> (a) Cargo in containers referred to below shall be loaded into or discharged out of containers at a waterfront facility by deep-sea ILA labor:
>
> (1) Containers, owned, leased or used by carriers (including containers or wheels and trailers), hereinafter "containers," which contain consolidated container loads, which come from or go to any point within a geographical area of any Management Port described by a 50 mile circle.

Although the actual language of the provision would seem to make it clear that any container "used" by a carrier, including shipper owned or leased containers were covered by the Rules, the respondents say this was not the intent of the Rules. Shipper owned or leased containers are not subject to the Rules. The Rules say respondents are "intended to cover containers which although not directly leased by the carrier nevertheless fall within the same category as leased containers—containers used by the carrier in the normal course of business operations of a steamship carrier for which the carrier assumes responsibility." The language of 1(a)(1) and its intent are at odds and an ambiguity is created which the respondents must cure by a change in the Rule.

Full containers loaded by the employees of an NVO or other person dealing with the ocean carrier as a shipper are subject to the requirements of Rule 1(a)(1).

Rule 1(a)(1) provides that containers are to be loaded by ILA labor at a waterfront facility (hereinafter referred to as pier) which:

> (2) . . . come from a single shipper which is not the manufacturer ("manufacturer's label") into which the cargo has been

> loaded (consolidated) by other than its own employees and such containers come from any point within the "geographic area" . . . .

Standing alone, this provision does not make clear whether an NVOCC or other single shipper, which is not the manufacturer, but which loads a container with its own employees is subject of Rule 1 and, therefore, required to have its cargo loaded at the pier by ILA labor. However, Rule 2(a)(2) and (3) sets forth which cargo in containers is *not* subject to loading by ILA labor at the pier. These Rules exempt:

> (2) Containers loaded with cargo at a "qualified shipper's facility with its own employees, and
>
> (3) Containers loaded with the cargo of a single manufacturer ("manufacturer's label") at its facility with its own employees.

NVOCC's, or any other off-pier consolidator which have no beneficial or proprietary interest in the cargo which it loads or consolidates for its shipper customers would not, therefore, fall with the category of a "qualified shipper" or single manufacturer as defined by the Rules. As a result, under the terms of Rule 1(a)(2) and Rule 2(A)(2) and (3) being read together, full containers, whether from a single shipper or consolidated containerloads, which are loaded by an NVOCC or any other off-pier consolidator, located within a 50 mile radius of any Management Port, would be subject to the provisions of the Rules. The Rules would be equally applicable to import shipments destined to an NVOCC or off-pier deconsolidator located within 50 miles of a Management Port under Rules 1(a)(3) and 1(B)(2).

Finally, the Rules do not require that the liquidated damages of $1,000 per container be passed on to the shippers. There is however nothing in the Rules to prevent the carrier from doing so.[49]

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[49] In fact one carrier, Hapag-Lloyd notified trucking companies in the Hampton Roads area that it required reimbursement for any fines levied by the ILA.

2. The membership of NYSA during January and February, 1981. For the membership during this period, see Appendix B.

3. The ports at which outstanding injunctions or other circumstances unrelated to the free choice of the ILA precluded carriers from implementing the Container Rules during January and February 1981.

The only port at which implementation of the Rules was prohibited by circumstances unrelated to the free choice of the ILA was the Port of Philadelphia which was under the injunction granted in *Hirsch* v. *ILA Local 1242*, No. 79-2022 (E. D. Pa. 1979).

4. A detailed description of the actions, if any, taken to implement the Container Rules during January and February, 1981.

A Carrier's Container Council was created and the Council through trade and media advertisements and notices to the shipping public tried to notify those interested that the Rules were to be implemented on January 1, 1981, but not all affected by the Rules were made aware that they were going to be enforced. Implementation of the Rules was for the most part accomplished on the basis of the individual case or situation by the individual ocean carrier. That is to say, that the Rules were enforced by the Carriers for the most part on the basis of their own interpretation of the Rules.

The carriers did not adopt any formal procedures for the identification of those containers affected by the Rules, but relied instead on normal or customary shipping documentation. For individual efforts by the carriers see the Findings of Fact above.

5. A finding as to whether any of the seven enumerated aspects of the Container Rules . . . as they were implemented or necessarily would be implemented in the absence of labor law restraints—are unfair, unduly prejudicial or unjustly discriminatory between shippers within the meaning of Shipping Act sections 14 Fourth, 16 First, and 17 first paragraph.

The seven aspects referred to are (1) refusing to load containers or trailers into vessels; (2) refusing to deliver containers or

trailers; (3) refusing to book cargo or to honor existing bookings; (4) refusing to supply or make available containers or other equipment owned, leased or used by the carriers at certain off-pier facilities; (5) requiring certain containerizable cargoes to be shipped to the port in a "loose condition"; (6) charging certain shippers for fines assessed against the carrier for violation of the Container Rules; (7) imposing additional charges for stuffing and restuffing containers or trailers at the piers. Assuming that the seven aspects are not justified by any transportation conditions each would violate all or one of the sections specified if they were selectively or discriminatorily applied unless they are excused by labor policy considerations. Applying the balance of interests test established above, the failure of proponents to establish injury from the Rules precludes a finding that the rules are unfair or unjustly discriminatory under sections 14 Fourth or 17 or that they are unduly or unreasonably prejudicial under section 16.

6. A finding as to whether any of the seven enumerated aspects of the Container Rules—as they were implemented or necessarily would be implemented in the absence of labor law restraints—are unjust or unreasonable within the meaning of section 17, second paragraph (foreign commerce) and section 18(a) (domestic offshore commerce).

The same conclusions are dictated here as were reached under 5. above. If the seven aspects are without support or justification by valid transportation conditions and if they result in disparate treatment of shippers, they are unjust and unreasonable if not justified by labor policy considerations. On balance, the labor policy considerations justify the Rules and they do not violate the second paragraph of section 17 or section 18(a).

7. A conclusion as to whether unjust discrimination against shippers is prohibited in domestic offshore commerce by virtue of Shipping Act section 14 Fourth, section 16 First, section 18(a), or any combination of the above or any other provisions of the Shipping Act.

Section 18(a) requires that common carrier operating in the domestic offshore commerce establish just and reasonable rates and just and reasonable practices relating to the facilities for

transportation and all other matters related to or connected with the receiving, handling, storing or delivering of property. A rate or practice which discriminates between shippers without sound foundation in transportation conditions is arbitrary because it is without a valid basis. It is therefore unreasonable and unjust. Thus in my opinion and always with the caveat that no specific instance is being adjudicated, the same kind of unjust discrimination prohibited in foreign commerce by section 17 is prohibited in offshore domestic commerce by section 18(a).

8. A conclusion as to whether each of the remaining Respondents would violate any of the above referenced Shipping Act sections if the Container Rules were implemented in their present form and recommendation as to whether any such respondent should be ordered to cease and desist from taking such action in the future.

For the reasons stated above, I conclude that none of the respondents has violated the Shipping Act, 1916, by reason of its actions under the Rules and that no cease and desist order should issue.

The Shipping Act, 1984, (46 U.S.C. app. §§ 1701 et seq.) has replaced the 1916 Act as the statute under which the foreign waterborne commerce of the United States is regulated. Present and future activity under the Rules must be judged by the requirements of the 1984 Act so consideration of the Rules under the 1984 Act is necessary. The central problem is whether there is anything in the 1984 statute which requires a new approach to the Rules or would dictate a result different from that reached under the 1916 Act.

As relevant to this proceeding, the 1984 Act carried over the substantive prohibitions of the 1916 Act:

Shipping Act of 1916	Shipping Act of 1984
Section 14 (Fourth)	Section 10(b)(6)
Section 16 (First)	Section 10(b)(11),(12)
Section 17 (First) (deleted)	Section 10(b)(11)
Section 18(a)	Section 10(b)(6)(domestic)
(domestic commerce)	(foreign commerce)

Both sides agree that the 1984 Act's prohibitions against unfair or unreasonable treatment, unjust discrimination and undue or unreasonable prejudice are no more stringent that those contained in the 1916 Act. Thus, conduct which is not violative of sections 14 Fourth, 16 First or 17 is not unlawful under section 10(b) of the 1984 Act. Proponents however point to two "changes" in the 1984 Act which they claim strengthens their position.

The first is found in section 3 of the Act which proponents say "clarifies and broadens" some definitions from section 1 of the 1916 Act and adds some new definitions relevant here. The most important of these changes, say proponents, is the addition of definitions for "shipper" and "nonvessel common carrier." Section 3(23) defines "shipper" as:

> . . . an owner or person for whose account the ocean transportation of cargo is provided or the person to whom delivery is made.

Section 3(17) defines "non-vessel-operating common carrier" as:

> . . . a common carrier that does not operate the vessels by which the ocean transportation is provided and is a shipper in its relationship with an ocean common carrier.

The definition of "shipper" is important to proponents because it supports their position that non-vessel operating common carriers are shippers and refutes the respondents' argument that only the "owner or beneficial owner" of the cargo is a shipper. This coupled with the definition of non-vessel-operating common carrier which "is a shipper in its relationship with an ocean common carrier" clearly brings all proponents within the protection of the Act's prohibitions. Respondents, of course, disagree. Without going into the niceties of the arguments, the proponents are shippers under the 1916 Act (for the reasons stated above) and remain so under the 1984 Act by virtue of the definition of shipper in section 3(17). [50]

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[50] Respondents' argument is based on the "function" the NVO performs at any given time, i.e. when an NVO loads or unloads a container it is not a shipper

Footnote continued on next page

The second change cited by respondents is found in section 10(c) which provides in relevant part:

> (c) Concerted Action—No Conference or group of two or more common carriers may—
> (1) boycott or take any other concerted action resulting in an unreasonable refusal to deal;
> (2) engage in conduct that unreasonably restricts the use of intermodal services or technological innovations. [51]

Proponents insist that this is a clear indication "that Congress intended to hold concerted action by carriers resulting in boycotts or unreasonable refusals to deal to the strictest scrutiny and to hold such unfair and discriminatory practices unlawful. In support of their proposition that section 10(c)(1) renders the Rules unlawful, the proponents quote the following from the Senate Report on S. 504:

> An example of a concerted refusal to deal is found in Agreement No. 10294 No. 77-23 (F.M.C. Initial Decision served December 13, 1979). Article 2 of Agreement No. 10294 prohibited any party to the agreement from paying consolidation allowances for shipments consolidated or deconsolidated at places other than deep-sea waterfront facilities, notwithstanding anything to the contrary in any tariff or agreement in force. The Administrative Law Judge found that Agreement No. 10294 was a type of group boycott aimed at one segment of the consolidation industry. He concluded that it was disapprovable under the unjustly discriminatory standard of section 15 of the Shipping Act, 1916. Agreement No. 10294 was withdrawn by the parties prior to a Commission decision on exception to the initial decision. It is intended that group boycotts or concerted refusals to

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Footnote continued from previous page

(presumably a shipper's function is to ship) and thus a carrier can refuse to furnish the NVO containers. By the same token, a carrier can order an NVO's container stripped and restuffed even though the NVO's "function" at that time *is* to ship the container. Such selective dissection of the NVO's operation is less than persuasive.

[51] This discussion of section 10(c) by the parties is at my request made when granting the proponents' motion to file memoranda on the new Act.

deal which fell within the unjustly discriminatory standard of section 15 of the Shipping Act, 1916, be prohibited under section 12 (c)(1) [now 10(c)(1) of the 1984 Act]. S. Rep. No. 98-3, p. 36.

The proponents argue that the Rules constitute a similar boycott or refusal to deal with consolidators of a kind more serious than the one found in Docket 77-23 and as such it is prohibited by section 10(c)(1). Respondents point out proponents are replaying "the theme of their earlier brief—that the Rules are unreasonable *per se.*" The proponents' sole explanation of why the Rules violate section 10(c)(1) is by analogy to the initial decision in Docket 77-23 cited in the above quote from the Senate Report. A close reading of that quote reveals that the Senate did not say that it agreed with the initial decision referred to but only that group boycotts or concerted refusals to deal "which fell within the unjustly discriminatory standard of section 15" of the 1916 Act would be prohibited. There is also the obvious infirmity of the withdrawal of the agreement before a final decision by the Commission. The simple analogy offered by proponents is not enough. Proponents must show *why* the *Rules* themselves violate section 10(c)(1).

To begin with proponents speak of a "boycott" or a "refusal deal" as if they were separate offenses under 10(c)(1). This misreads the prohibition. The section only prohibits an "unreasonable refusal to deal" which results from a "boycott or other concerted action." Respondents in their turn replay the theme of their earlier brief and again say that they have never "refused to deal" with the proponents, i.e. they "were prepared to accept all cargo brought to the piers in a manner consistent with the Rules." The refusal to accept a consolidator's container on the same terms as a FSL container is a refusal to deal and no amount of semantic maneuvering by respondents can alter it. [52] But the question is whether the refusal to deal is unreasonable. Propo-

[52] When a consolidator brings a container to the pier, the carrier will refuse to transport unless the ILA strips it and restuffs it. This is a refusal to deal with that consolidator's container on the same basis as it would the container of an FSL container. Whether this meets the precise definition of a refusal to deal under the labor laws, it is a refusal to deal under the Shipping Act, 1984. To conclude otherwise would make any "conditional" refusal lawful and thus make possible the very disparate treatment the Act strives to prevent.

nents do not address this question in any but the most perfunctory or conclusionary way. If the "balance of interests" test is applied here the conclusion has to be that the refusal is not unreasonable for the same reasons the Rules were found to be not unjustly discriminatory under the 1916 Act.

The respondents also challenge section 10(c)(1), and 10(c)(2) for that matter, on the ground that they do not apply to the activity in question under the Rules. They point out that the two sections deal only with concerted activity—matters which under the 1916 Act would have been subject to section 15. The respondents argue that the only concerted activity here is the carriers' execution of their obligations under the collective bargaining agreement and their subsequent agreements on the implementation of the Rules and that this collective bargaining agreement as well as any subsequent amendments thereto, are exempt from the 1984 Act. This argument is grounded on sections 3(16) and 5(e) of the 1984 Act. Section 3(16) provides:

> (16) "maritime labor agreement" means a collective-bargaining agreement between an employer subject to this Act, or group of such employers, and a labor organization representing employees in the maritime or stevedoring industry, or an agreement preparatory to such a collective-bargaining agreement among members of a multiemployer bargaining group, or an agreement specifically implementing provisions of such a collective-bargaining agreement or providing for the formation, financing, or administration of a multiemployer bargaining group; but the term does not include an assessment agreement.

Section 5(e) provides:

> (e) MARITIME LABOR AGREEMENT.—This Act, the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, does not apply to maritime labor agreements. This subsection does not exempt from this Act, the Shipping Act, 1916, or the Intercoastal Shipping Act, 1922, any rates, charges, regulations, or practices of a common carrier that are required to be set forth in a tariff, whether or not those rates, charges, regulations, or practices arise out of, or are otherwise related to, a maritime labor agreement.

Respondents have ignored the last sentence of section 5(e) which places outside the exemption for maritime labor agreement, "any rates, charges, regulations, or practices of a common carrier are that required to be set forth in a tariff, whether or not those rates, charges, regulations, or practices arise out of or are otherwise related to, a maritime labor agreement." By ignoring this "exemption" from the exemption, respondents would create a fatal inconsistency—on the one hand activity under the Rules is exempt from the statute, but on the other it is rendered unlawful or unreasonable by that statute.

Concerted activity under a collective bargaining agreement or an agreement specifically implementing the bargaining agreement is exempt from the 1984 Act so long and only so long as the practice, etc. does not have to be included in the carriers' tariffs. Since the Rules are required to be in the respondents' tariffs, the activities under them are not exempt from the provisions of section 10(c)(1) and 10(c)(2).

Under section 10(c)(2), concerted activity or conduct which "unreasonably restricts the use of intermodal services or technological innovations" is prohibited. In opposing the Rules under this section, proponents rely on general statements made by Congress, and in case law, or on proposed findings of fact which were rejected or modified as not supported by the record, etc. They do not take into consideration the labor factors which prompted the Rules.

That the Rules are the product of a long and bitter struggle over the containerization issue has attained the status of a truism. At the outset, the union could have insisted that the work be done as it had always been done and tried to prevent the use of containerships at all. *NLRB* v. *International Longshoremen's Association*, 447 U.S. 490, 510 (1980). Instead, for whatever reasons, the union and the employers in a series of steps reached the present accommodation on the Rules. This reasoned response to technological innovation left unaffected most of the intermodal shipments occurring today. It may be that over 80% of the container traffic is unaffected by the Rules. This poses the principle question: Do the Rules, after weighing their impact on the technological innovation of containerization against the work preser-

vation benefits gained by the union, constitute an unreasonable restriction on intermodal services? The question cannot be satisfactorily answered on this record and since the burden of showing that the Rules unreasonably restrict intermodal services or the technological innovation of containerization is on the proponents and the Commission, the Rules must be allowed to stand. On the basis of the record in this proceeding, I conclude that the Rules on Containers do not violate the Shipping Act, 1984.

Since the Rules on Containers did not violate the Shipping Act, 1916, and do not violate the Shipping Act, 1984, the proceeding should be dismissed.

John E. Cograve
Administrative Law Judge

Washington, D.C.
February 8, 1985

APPENDIX A

RESPONDENT CARRIERS

ABC Container Line N.V.
Agromar Lines
Alcoa Steamship Co., Inc.
American Atlantic Lines
Armasal Line
Atlantic Cargo Services, AB
Atlantic Container Line, Ltd.
Atlanttrafik Express
Bangladesh Shipping Corp.
The Bank & Savill Line
Bank Line, Ltd.
Barber Blue Sea Line
Bermuda Container Line
A. Bottachi. S.A. De Navegacion
Black Star Line, Ltd.
Box Lines
Caribe Cargo Express, Inc.
Cast Lines
CCT
Chilean Line
CMA
Columbus Lines, Inc.
Compganie Generale Transatlantique; French Line
Compganie Maritime Zairoise
Compagnie Nationale Algerienne De Navigation
Companhia De Navegacao Loide Brasileiro
Companhia De Navegacao Maritima Netumar
Compania Peruana de Vapores
Compania Transatlantica Espanola, S.A.; Spanish Line
Concorde Line
Concordia Line
Constellation Line
Contract Marine Carriers, Inc.
Costa Line
Dampskibsselskabet Torm A/S; Torm Lines
Dart Containerline Co., Ltd.
Delta Steamship Lines, Inc.
Ecuadorian Line, Inc.
E.L.M.A.
Egyptian National Line
Evergreen Line
Farrell Lines
Flomerca Line
Forest Lines
Frota Amazonica S.A.

RESPONDENT CARRIERS
(Continued)

Galleon Shipping Corp.
Galapagos Line, S.A
G.B.S. Line, Ltd.
Grancolombiana
Gulf Europe Express
Hafskip, Ltd.
Hapag Lloyd AG
Hellenic Lines Ltd.
Hoegh Lines
Holland Pan-American Line
Ibero Lines
Iceland Steamship Co., Ltd.
Imparca Express
Italian Line
Ivaran Lines
Japan Line (U.S.A.), Ltd.
Jeco Shipping Line
Jugolinija
K Line
Kirk Line
Koctug Line
Korea Shipping Corp., Ltd.
Lignes Centrafricaines
Linea Manaure C.A.
Lykes Bros. Steamship Co., Inc.
Maersk Line
Mar Chile Line
Maritime Company of the Philippines
Medafrica Line
Mexican Line
Mitsui O.S.K. Lines, Ltd.
Moore-McCormack Lines
Nacional Line
Namucar Line
Naviera Central, C.A.
Nedlloyd Lines
Neptune Orient Lines, Ltd.
Nigeria America Line
Nigeria Star Line
Nippon Yusen Kaisha
Nopal Lines

APPENDIX B

NEW YORK SHIPPING ASSOCIATION, INC. MEMBERSHIP LIST
STEAMSHIP CARRIER AND STEAMSHIP AGENT MEMBERS
DURING JANUARY AND FEBRUARY, 1981

American Atlantic Shipping, Inc.
Argentine Lines (E.L.M.A.)
Associated Container Transportation (Australia) Ltd.
Atlantic Container Line (G.I.E.)
Barber Blue Sea
Bermuda Container Line
Chilean Line
Columbus Line, Inc.
Concordia Line
Contract Marine Carriers
Costa Line
Dart Containerline, Inc.
Delta Steamship Lines, Inc.
Evergreen Marine Corp. (New York) Ltd.
Farrell Lines, Incorporated
Grancolombiana (New York), Inc.
Hapag-Lloyd AG
Hellenic Lines, Ltd.
Italian Line
Japan Line, Ltd.
Kawasaki Kisen Kaisha, Ltd.
Korea Shipping Corporation
Leif Hoegh & Co. A/S
C.N. Lloyd Brasileiro
Maersk Line
Mitsui O.S.K. Lines, Ltd.
Moore-McCormack Lines, Inc.
Netumar Lines
N.Y.K. Line
Orient Overseas Container Line/Orient Overseas Line
Peruvian State Line
Prudential Lines, Inc.
Puerto Rico Marine Management, Inc.
Royal Netherlands Steamship Company (Antilles)N.V.
Saudi Concordia Line
Sea-Land Service, Inc.
Seatrain Lines, Inc.
South African Marine Corporation (N.Y.)
Spanish Line
Trans Freight Lines, Inc.
Transportacion Maritima Mexicana
United Arab Shipping Company
United States Lines, Inc.
Venezuelan Line

Appendix C-Administrative Law Judge Decision

NEW YORK SHIPPING ASSOCIATION, INC. MEMBERSHIP LIST
STEAMSHIP CARRIER AND STEAMSHIP AGENT MEMBERS
DURING JANUARY AND FEBRUARY, 1981
(Continued)

Waterman Steamship Corporation
Yamashita-Shinnihon Steamship Co., Ltd.
Zim-American Israeli Shipping Company, Inc.
AB Atlanttrafik
Associated Container Transportation (USA)
Atlantic Overseas Corporation
The Bank Line Limited
Barber Steamship Lines, Inc.
Boyd, Weir & Sewell, Inc.
Canadian Transport (N.Y.), Inc.
Compagnie Maritime Zairoise
Constellation Navigation, Inc.
Costa Line Cargo Services, Inc.
Crossocean Shipping Company, Inc.
Cunard Line, Ltd.
P.T. Djakarta Lloyd
Evergreen-Handt Corp.
Flomerca Line
Flota Mercante Gran Centroamericana, S.A.
French Line
Compagnie Generale Transatlantique
Frota Amazonica, S.A.
Holland America Cruises
Home Lines Cruises Inc.
Kerr Steamship Company, Inc.
Moller Steamship Company, Inc.
Motorships, Inc.
Norton, Lilly & Company, Inc.
P & O Strath Services
The Peninsular & Oriental Steam Navigation Company
Portuguese Line (CTM)
Companhia Portuguesa de Transportes Maritimos, E.P.
Refrigerated Express Lines (A/asia) Pty., Ltd.
Saudi National Lines
The Scindia Steam Navigation Co., Ltd.
Seaboard Shipping Company (1974) Inc.
The Shipping Corporation of India, Ltd.

NEW YORK SHIPPING ASSOCIATION, INC. MEMBERSHIP LIST
STEAMSHIP CARRIER AND STEAMSHIP AGENT MEMBERS
DURING JANUARY AND FEBRUARY, 1981
(Continued)

Smith & Johnson (Shipping) Inc.
Solar International Shipping Agency, Inc.
TTT Ship Agencies, Inc.
Tilston Roberts Corporation
Westship International, Inc.
Nordana Line
Ocean World Lines
Orient Overseas Container Line
P.A.C.E. Line
Pakistan National Shipping Corp.
P & O Strath Services
Polish Ocean Lines
Portuguese Line C.T.M.
Prudential Lines, Inc.
Puerto Rico Maritime Shipping Authority
Rocargo, C.A.
Ro-lo Pacific Line
Royal Netherlands Steamship Co.
Salen Dry Cargo
Saudi Concordia Shipping Co., Ltd.
Saudi National Lines
Scindia Steam Navigation Co., Ltd.
Sea-Land Service, Inc.
Shipping Corp. of India, Ltd.
South Africa Marine Corp., Ltd.
Span-Chile Line
Surinam Line
TMS Line
Trans Caribbean Lines
Trans Freight Lines
Transnave-Tranporte Navieros Ecuatorianos
Trans World Systems
Trikora Lloyd
Uiterwyk Shipping Lines
United Arab Shipping Co. (S.A.G.)
United States Lines, Inc.
U.S. Africa Line
Venezuelan Line
Waterman Steamship, Corp.
Westwind Africa Line, Ltd.
Yamashita Shinnihon Steamship Co.
Yangming Marine Transport Corp.
Zim Lines

APPENDIX D
Judgment of the Court of Appeals

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1347 **September Term, 1987**

New York Shipping Association, Inc.,
International Longshoremen's Association, AFL-CIO,
Council of North Atlantic Shipping Associations,
Atlantic Container Line, Ltd.,
Dart Containerline Company, Limited,
Hapag-Lloyd Aktiengesellschaft,
"Italia" S.P.A.N,
Nedlloyd Lines B.V.,
Puerto Rico Maritime Shipping Authority,
Sea-Land Service, Inc.,
Trans Freight Lines, Inc. and
United States Lines, Inc., Petitioners

v.

Federal Maritime Commission and
United States of America, Respondents

---

and Consolidated Case No. 87-1370

PETITIONS FOR REVIEW OF AN ORDER OF THE FEDERAL MARITIME COMMISSION

Before: BUCKLEY and D.H. GINSBURG, Circuit Judges, and HOWARD T. MARKEY*, Chief Judge

JUDGMENT

These causes came on to be heard on the petitions for review of an order of the Federal Maritime Commission and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the petitions for review are denied, in accordance with the Opinion of the Court filed herein this date.

Per Curiam
FOR THE COURT:
s/Constance L. Dupre
CONSTANCE L. DUPRE, CLERK

Date: August 9, 1988
Opinion for the Court filed by Circuit Judge D.H. Ginsburg.

* Of the United States Court of Appeals for the Federal Circuit, sitting by designation pursuant to 28 U.S.C. §291(a).

APPENDIX E
Relevant Statutes

§ 14 Fourth of the Shipping Act, 1916, 46 U.S.C. § 812 Fourth (1982)

"No common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of State, Territory, District, or possession of the United States and any other such port or a port of a foreign country -

* * *

Fourth. Make any unfair or unjustly discriminatory contract with any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims."

§ 16 First of the Shipping Act, 1916, 46 U.S.C. § 815 First (1982)

"It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly -

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided*, That within thirty days after enactment of this Act, or within thirty days after the effective date or the filing with the Commission, whichever is later, of any conference freight rate, rule, or regulation in the foreign commerce of the United States, the Governor of any State, Commonwealth, or possession of the United States may file a protest with the Commission upon the ground that the rate, rule, or regulation unjustly discriminates against that State, Commonwealth, or possession of the United States, in which case the Commission shall issue an order to the conference to show cause why the rate, rule, or regulation should not be set aside. Within one hundred and eighty days from the

date of the issuance of such order, the Commission shall determine whether or not such rate, rule or regulation is unjustly discriminatory and issue a final order either dismissing the protest, or setting aside the rate, rule, or regulation."

§ 17 of the Shipping Act, 1916,
46 U.S.C. § 816 (1982)

"No common carrier by water in foreign commerce shall demand, charge or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the Federal Maritime Commission finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Commission finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe and order enforced a just and reasonable regulation or practice."

§ 18(a) of the Shipping Act, 1916,
46 U.S.C. § 817 (1982)

"(a) Every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts , and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property.

Every such carrier shall file with the Commission and keep open to public inspection, in the form and manner and within the time prescribed by the Commission, the maximum rates, fares, and charges for or in connection with transportation between points on its own route; and if a through route has been established, the maximum rates, fares, and charges for or in connection with transportation between points on its own route and points on the route of any other carrier by water.

No such carrier shall demand, charge, or collect a greater compensation for such transportation than the rates, fares, and charges filed in compliance with this section except with the approval of the Commission and after ten days' public notice in the form and manner prescribed by the Commission, stating the increase proposed to be made; but the Commission for good cause shown may waive such notice.

Whenever the Commission finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected, or observed by such carrier is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice.

Section 5 of the Maritime Labor Agreements Act, 46 U.S.C. § 841c (1982)

The provisions of this chapter and of the Intercoastal Shipping Act, 1933 [46 U.S.C. § 843 et seq.], shall not apply to maritime labor agreements and all provisions of such agreements except to the extent that such provisions provide for the funding of collectively bargained fringe benefit obligations on other than a uniform man-hour basis, regardless of the cargo handled or type of vessel or equipment utilized. Notwithstanding the preceding sentence, nothing in this section shall be construed as providing an exemption from the provisions of this chapter or of the Intercoastal Shipping Act, 1933, for any rates, charges, regulations, or practices of a common carrier by water in interstate commerce or other person subject to this chapter which are required to be set forth in a tariff, whether or not such rates,

charges, regulations, or practices arise out of, or are otherwise related to a maritime labor agreement.

§ 4 of the Intercoastal Shipping Act, 1933
46 U.S.C. § 845a (1982)

"Whenever the Federal Maritime Commission finds that any rate, fare, charge, classification, tariff, regulation, or practice demanded, charged, collected, or observed by any carrier subject to the provisions of this chapter is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum or minimum, or maximum and minimum rate, fare or charge, or a just and reasonable classification, tariff, regulation, or practice: *Provided*, That the minimum-rate provision of this section shall not apply to common-carriers of the Great Lakes: *Provided further*, That upon such finding of unjustness or unreasonableness in a proceeding instituted by a complaint pursuant to the provisions of section 821 of this title, and the Commission shall direct full reparation to the complaintant of the difference between the charge collected and the just and reasonable rate, fare, or charge, plus interest on such amount computed on the basis of the average of the prime rate charged by major banks, as published by the Board of Governors of the Federal Reserve System, during the period to which the reparation applies."

§§ 10(b) (6) (C), 10(b) (11)-(12)
of the Shipping Act, 1984, 46 U.S.C.
§ 1709(b) (6) (C) and b(11)-(12) (Supp. III 1986)

"(b) No common carrier, either alone or in conjunction with any other person, directly or indirectly, may -

* * *

(6) except for the service contracts, engage in any unfair or unjustly discriminatory practice in the matter of -

* * *

(C) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage;

* * *

(11) except for service contracts, make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever;

(12) subject any particular person, locality, or description of traffic to an unreasonable refusal to deal or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

§ 10(d) (1) of the Shipping Act, 1984, 46 U.S.C. §1709(d) (1) (Supp. III 1986)

"No common carrier, ocean freight forwarder, or marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations an d practices relating to or connected with receiving, handling, storing, or delivering property."

No. 88-756 (3)

Supreme Court, U.S.
FILED
NOV 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NEW YORK SHIPPING ASSOCIATION, INC.; COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS; ATLANTIC CONTAINER LINE, LTD.; DART CONTAINERLINE COMPANY, LIMITED; HAPAG-LLOYD AKTIENGESELLSCHAFT; "ITALIA" S.P.A.N.; NEDLLOYD LINES, B.V.; PUERTO RICO MARITIME SHIPPING AUTHORITY; TRANS FREIGHT LINES, INC.; P & OCL (TRANS FREIGHT LINES), LTD.; and SEALAND SERVICE, INC.,
Petitioners,

VS.

FEDERAL MARITIME COMMISSION; UNITED STATES OF AMERICA; AMERICAN TRUCKING ASSOCIATIONS, INC.; AMERICAN WAREHOUSEMEN'S ASSOCIATION; NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC.; FLORIDA CUSTOM BROKERS AND FORWARDERS ASSOCIATION; INTERNATIONAL ASSOCIATION OF NVOCCS; AND WEST GULF MARITIME ASSOCIATION,
Respondents.

BRIEF OF RESPONDENT WEST GULF MARITIME ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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November 23, 1988

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

28 pp

QUESTION PRESENTED

Respondent West Gulf Maritime Association, which supports the petition for certiorari herein, would rephrase the question presented as follows:

Where federal labor law compelled unionized employers to bargain in good faith concerning a union's work preservation demand and the resulting labor agreement was lawful under the labor laws, may a non-labor regulatory agency exclude all labor factors from consideration in passing upon the "reasonableness" of the agreement merely because federal labor law did not compel adoption of the particular labor terms?

In response to Rule 28.1, Respondent West Gulf Maritime Association identifies the companies comprising its members and affiliate members as follows:

American Shipping & Chartering, Inc.
Atlantic Container Line/Gulf Container
Ayers Maritime Services, Inc.
Barwil Agencies (Texas), Inc.
Barbours Cut Marine Contractors
Biehl & Co.
Boyd-Campbell Co., Inc.
E. S. Binnings, Inc.
Ceres Terminals, Inc.
C. Flanagan & Sons
Chaparral Stevedoring Co. of Texas
Coastwise, Inc.
Container Terminal of Galveston
Deepsea Agents, Inc.
Del Monte Stevedoring Co.
Dix Industries, Inc.
Evergreen International (USA) Corp.
Fairway Terminal Corp.
Gale Shipping Inc.
Gulf Motorships, Inc.
Gulf & Atlantic Maritime Service, Inc.
Gulf & Eastern S.S. & Chartering, Corp.
Gulf-Ocean Shipping Corp.
I. T. O. Corporation
International Stevedores, Inc.
Jahre Shipping U. S. A., Inc.
James J. Flanagan Shipping Corp.
Johnson Maritime Services (Gulf) Inc.
Kerr Steamship Company, Inc.
Lake Charles Stevedores, Inc.
Lykes Bros. Steamship Co., Inc.
Maersk Container Service Co., Inc.
Maersk Line Agency
Marine Terminal Shipping Company
Navios Ship Agencies, Inc.
Norton, Lilly International Inc.
Oceans International Corporation
Overseas Freight Corp.
P. C. Pfeiffer & Co.
Philen Shipping Co.
Phillips-Parr, Inc.
Pierside Industries, Inc.
Port-Cooper/T. Smith Stevedoring
Port Houston Terminals
Riise Shipping, Inc.
Rogers Terminal & Shipping Corp.
A Division of Cargill Marine & Terminal
Ryan-Walsh Stevedore Co.
Sea-Gulf Maritime, Inc.
Sea-Land Service, Inc.
Shippers Stevedoring Company
Smith & Johnson (Houston) Inc.
Solar Shipping Agency, Inc.
Southern Steamship Agency, Inc.
Southern Stevedoring Co., Inc.
South Side Services, Inc.
States Shipping Agency, Inc.
Strachan Shipping Company of Texas, Inc.
Suderman Stevedores
Teh Tung Steamship (Houston) Inc.
Terminal Service of Houston, Inc.
Trans Freight Lines, Inc.
Transave
Transmarine Navigation Corp.
Universal Shipping Agencies
Waterman Steamship Corporation
Westwind Africa Line Ltd.
Young & Company
Zim-American Israeli Shipping Co., Inc.

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No. 88-756

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NEW YORK SHIPPING ASSOCIATION, INC.; COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS; ATLANTIC CONTAINER LINE, LTD.; DART CONTAINERLINE COMPANY, LIMITED; HAPAG-LLOYD AKTIENGESELLSCHAFT; "ITALIA" S.P.A.N.; NEDLLOYD LINES, B.V.; PUERTO RICO MARITIME SHIPPING AUTHORITY; TRANS FREIGHT LINES, INC.; P & OCL (TRANS FREIGHT LINES), LTD.; and SEALAND SERVICE, INC.,
Petitioners,

vs.

FEDERAL MARITIME COMMISSION; UNITED STATES OF AMERICA; AMERICAN TRUCKING ASSOCIATIONS, INC.; AMERICAN WAREHOUSEMEN'S ASSOCIATION; NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC.; FLORIDA CUSTOM BROKERS AND FORWARDERS ASSOCIATION; INTERNATIONAL ASSOCIATION OF NVOCCS; AND WEST GULF MARITIME ASSOCIATION,
Respondents.

BRIEF OF RESPONDENT WEST GULF MARITIME ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

This case involves a decision of the Federal Maritime Commission ("FMC") ordering ocean carriers not to carry out provisions of a labor agreement, held lawful by this Court under the labor laws, because the FMC found the labor agreement to be "unreasonable" under the Shipping Acts. (Appendix to Petition for Certiorari "App." B, 70a et seq.; *See NLRB v. International*

Longshoremen's Ass'n ("*ILA II*"), 473 U.S. 61 (1985); *NLRB v. International Longshoremen's Ass'n*, ("*ILA* I"), 447 U.S. 490 (1980).) The FMC reached this conclusion only by expressly excluding from its "reasonableness" determination the labor purpose of the agreement, federal labor policy, the employers' mandatory duty to bargain in good faith on the subject, and the economic consequences of the union's exercise of its federally protected right to strike in the event that the employers refused to accept this labor compromise. (*See* App. A, 16a, 30a-31a, 45a, 57a, App. B, 161a, 172a) Giving any weight to labor factors in the Shipping Act analysis was held to be "inconsistent with . . . [the FMC's] statutory responsibilities". (App. A, 57a)

PARTIES, OPINIONS BELOW, JURISDICTION AND APPLICABLE STATUTES

The references to the parties to the proceeding, to opinions below, to statements of jurisdiction and to applicable statutes as set forth in the petition for writ of certiorari filed by petitioners International Longshoremen's Association et al., November 3, 1988, are hereby incorporated by reference herein.

STATEMENT OF THE CASE

Petitioners are a union which is the bargaining representative of dockworkers at North Atlantic ports (hereinafter "ILA"), associations of their employers (hereinafter "NYSA" and "CONASA") and ocean common carriers regulated by the Federal Maritime Commission ("FMC") which are members of NYSA and CONASA. Respondent West Gulf Maritime Association ("WGMA") is a multiemployer collective bargaining association consisting of ocean carriers, stevedores, vessel agents and terminal operators whose jurisdiction covers Texas ports and the Port of Lake Charles, Louisiana.

Labor relations between the maritime employers and the ILA are subject to the National Labor Relations Act (29 U.S.C. § 151 et seq. (1982)). The labor laws impose on the employers a mandatory duty to bargain in good faith (29 U.S.C. § 158(a)(5)) when the union makes collective bargaining demands for preser-

vation of traditional work (29 U.S.C. § 158(d))[1] and protect the union's right to strike to apply economic pressure to obtain its bargaining goals.[2] In addition, these laws set boundaries by prohibiting labor agreements or conduct having certain secondary effects. (29 U.S.C. §§ 158(b)(4)(B) and (e)). The labor agreement was also subject to the antitrust laws and to the non-statutory labor exemption therefrom. Finally, the ocean carriers' rate tariffs and related commercial and terminal practices are subject to regulation under "reasonableness" standards set forth in provisions of the Shipping Acts of 1916 and 1984. These provisions, which do not apply to union conduct, prohibit "unreasonable" terminal practices, "unjust" economic discrimination or "undue" preferences.[3] (46 U.S.C. §§ 801, 813, 815, 816, 817a and 46 U.S.C. §§ 1701(b)(6)(C), 1709(b)(12), 1709(d)(1).)

The principal non-governmental parties adverse to petitioners are non-ILA employers who are freight consolidators, many of whom also operate as FMC-regulated non-vessel operating common carriers ("NVOCCs") by assuming carrier-type responsibility for ocean carriage under their own bills of lading. The ILA objected to performance of cargo handling work by these non-ILA employers insofar as they stuffed or stripped ocean containers with less-than-containerload ("lcl") shipments. Such shipments had traditionally been stowed by ILA labor directly in holds of vessels or had been consolidated at dockside terminals with other shipments in containers or on pallets. (*See ILA* II; App. B, 76a-81a.) The non-ILA employers were able to perform this function at non-ILA facilities with lower labor costs because the ocean carriers had adopted fully containerized services using cargo containers which could be readily transported to inland

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[1] *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 211-12 (1964); *Road Sprinkler Fitters v. NLRB*, 789 F.2d 9, 16 (D.C. Cir. 1986); *see NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

[2] *NLRB v. Insurance Agents Int'l*, 361 U.S. 477, 489 (1960).

[3] Shipping Act jurisprudence makes no operative distinctions among the terms "unreasonable", "unjust" and "undue"; they are collectively referred to herein simply as "reasonable" or "unreasonable".

points to be "stuffed" or "stripped" and tendered to (or received from) ocean carriers as a full container. (App. A, 5a-9a)

The Labor Agreement At Issue

The employers assented to a labor agreement that included the instant "Rules on Containers" in 1968. The Rules were a compromise reached after lengthy longshore strikes that paralyzed a substantial portion of U.S. export and import trades and after governmental intervention through a presidentially appointed mediator.[4] The labor agreement and similar agreements in the Gulf awarded certain port area "lcl" cargo stuffing and stripping work to ILA labor but exempted the predominant cargo movements that consist of single shipment containers and lcl cargo that is containerized at points more than 50 miles from the port. Since a closed container arriving at the docks may contain either port area lcl cargo subject to ILA work jurisdiction or, much more commonly, exempt cargo, the Rules required the ocean carriers having access to documents disclosing cargo contents and origins/destinations to enforce the agreement. (App. A, 8a-9a; App. B, 82a-86a)

To the extent that a work preservation agreement like the Rules on Containers is effective it necessarily prevents non-union employers or their subcontractors from using their own lower cost labor to perform the covered work. Similarly the labor agreement may reduce the non-union employers' profits either because facilities having higher labor costs must be used or because the non-union employers' profits are related in part to performing the particular labor function. Since such an agreement determines only who performs the labor function, the effect on ultimate consumers of the services—here the actual shippers or consignees of port area lcl cargo—is one of cost and convenience and not

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[4] App. A, 8a. The east coast strike lasted 57 days on the North Atlantic coast and over 100 days at Gulf ports, including ports covered by labor agreements to which respondent WGMA and its members are parties.

whether the function continues to be performed at all.[5] There is no evidence that port area lcl or NVOCC cargo would not be accepted for shipment under the Rules or would not be consolidated with other lcl cargo into containers so long as an ILA dock area facility is used to stuff or strip the container.

The non-ILA employers mounted legal challenges to the labor agreement under three federal statutes all raising the same basic issues. The primary attack under the National Labor Relations Act urged that the Rules constituted a prohibited hot cargo agreement or secondary boycott. (*See ILA* I) A second line of attack under the antitrust laws was mounted on group boycott theories paralleling the labor law claims and based on arguments that the labor exemption from the antitrust laws did not apply.[6] Thirdly, the non-ILA employers pursued actions under the Shipping Acts of 1916 and 1984 to which only the ocean carrier parties to the labor agreement were subject. (*See* App. A, 11a-20a)

After more than twenty years of litigation in multiple forums the conflict between the ILA and non-ILA employers was resolved and the agreement upheld under the labor laws as a valid work preservation agreement. (*ILA* II) The antitrust actions by the NVOCC/consolidators, which had been allowed to proceed based on a court's denial of a labor exemption at a time when the Labor Board had ruled the agreement unlawful, was vacated by

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[5] Since the method of enforcing the work preservation rules was a provision which precluded furnishing non-ILA port area consolidators with ocean carrier-owned or leased containers either (a) port area lcl cargo would have to be delivered (or picked up) by NVOCCs, by cargo owners or by their representatives at an ILA facility and consolidation/containerization performed there; as (b) port area lcl cargo would have to be transported to non- ILA cargo handling facilities outside the 50-mile port zone.

[6] *See Intercontinental Container Transport Corp. v. New York Shipping Ass'n*, 426 F.2d 884, 887 (1970); *Consolidated Express Inc. v. New York Shipping Ass'n.*, 602 F.2d 494 (3d Cir. 1979), *judgment vacated and case remanded*, 448 U.S. 902 (1980), and 641 F.2d 90 (3d Cir. 1981) (on remand).

this Court when the agreement was upheld under the labor laws. (*Consolidated Express, supra,* 448 U.S. 902 (1980).)

Initial Shipping Act Proceedings

The Shipping Act litigation was between the same economic interests and concerned the same basic issues and claims of injury as those before the NLRB. It commenced in 1973 and outlasted the other cases. In 1978, when the agreement had been held unlawful under the labor laws, the FMC rejected the position that the agreement was within an outright labor exemption from the Shipping Acts (App. A, 12a, App. B, 141a). However, unlike the reexamination of the labor exemption issue that occurred under the antitrust laws after the agreement was upheld under the labor laws, the FMC did not reexamine its denial of an outright labor exemption.

All the Shipping Act provisions in issue have two basic elements: first whether a prima facie case exists because a shipper or class of cargo is treated differently than another type of shipper or cargo and, second, the more important question of whether that difference is "reasonable" and hence justified. (App. B, 182a; *see* App. B, 176a-190a) "Reasonableness" determinations depend materially on the economic purpose served by a challenged rate, tariff rule or practice.[7] Since carrier tariffs filed with the FMC consist almost entirely of ocean rates or terms and conditions governing those rates,[8] the existing body of Shipping Act "reasonableness" law focuses on transport economics such as cost justifications for a surcharge, competition via different routes, geographical factors etc.[9] The Rules on Containers, which the FMC had compelled ocean carriers to add to their tariffs, on their face required use of ILA facilities which were applicable to port

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[7] *See Investigation of Overland & OCP Rates and Absorptions,* 12 F.M.C. 184 (1969), *aff'd. sub nom. Port of New York v. FMC,* 429 F.2d 663 (5th Cir. 1970), *cert. denied,* 401 U.S. 909 (1971).

[8] *See* 46 C.F.R. Parts 552, 580 (1987); *Agreement Provisions on Loyalty Contracts,* (Slip Op. 40, Oct. 31, 1988 (FMC)).

[9] *See, e.g., Imposition of Surcharge on Cargo to Manila,* 8 F.M.C. 395 (1965); *Overland & OCP Rates, supra,* 12 FMC at 206.

area lcl cargo but not to other cargo. This left the agreement's justification on "reasonableness" grounds as the sole question for disposition by the FMC. (App. A, 31a)

The only basis for an affirmative justification of the labor agreement on "reasonableness" grounds concerned its labor purpose, the labor problems avoided by its adoption and its lawful status under the labor laws. (*See* App. A, 31a) In its first decision on the merits, rendered at a time when the Rules had been held unlawful under the labor laws, the FMC determined that labor factors were entitled to consideration but to little weight and hence it held unreasonable and unlawful the distinctions which the Rules made between lcl and full containerload and between port area and non-port area cargo. (*Sea-Land Service, Inc.—Proposed Rules on Containers,* 21 F.M.C. 1 (1978), *remanded sub nom. Council of North Atlantic Shipping Ass'ns v. FMC ("CONASA"),* 672 F.2d 171 (D.C.Cir.), *cert. denied,* 459 U.S. 830 (1982).)

In explaining why it would give little weight to the only relevant factor which could constitute a reasonableness justification for this or virtually any other labor agreement, the FMC reasoned that a collective bargaining agreement is a factor "which *affects* but is not *a part of* the transportation aspects of a shipper's relationship with his carrier," and hence it stated that, although the collective bargaining source of the rules "is a factor to be considered," it "need not be given overwhelming priority or weight as a transportation factor by which to justify dissimilarity of treatment." (21 F.M.C. at 4 (emphasis in original).) The FMC rejected contentions that its standard for decision constituted a rule of *per se* unreasonableness for labor agreements. (*Id.*)

In 1980 the Court of Appeals for the District of Columbia Circuit affirmed the FMC's rejection of an outright labor exemption for the agreement, but remanded the case to the FMC for consideration of two intervening decisions by this Court. (*CONASA, supra;* see *ILA* I; *FMC v. Pacific Maritime Ass'n,* 435 U.S. 40 (1978) ("*PMA*").) The court directed the FMC to consider labor policy and labor factors in addressing the Shipping Act merits. It noted that *PMA* "asserts the importance of labor policy in reaching substantive shipping law decisions" and makes

the necessity of the labor provisions "a factor that the FMC should consider in making its substantive determination of legality". (*CONASA, supra* 672 F.2d at 188 n.135, see 181, n.80, 189.) On remand, however, the FMC reaffirmed its original decision, asserting that it had already complied with the mandate to consider labor factors. (*Sea-Land Service, Inc.—Proposed Rules on Containers,* 21 S.R.R. 852 (FMC 1982).) The court of appeals vacated this decision and ordered further FMC proceedings stayed until completion of a companion FMC case, Docket 81-11, which the FMC had initiated a year earlier. (*See* App. C, 228a)

The Shipping Act Proceedings In This Case

FMC Docket 81-11, which is before the Court, was a fresh FMC proceeding triggered by NVOCC complaints about implementation of the Rules following this Court's decision in *ILA I.* After initially directing its Administrative Law Judge not to consider any further labor factors, the FMC, following the court of appeals' order on remand in *CONASA*, amended that directive, because the court's decision had "*made clear that labor policy factors must be considered in Shipping Act deliberations*". (*"50-Mile Container Rules"—Implementation By Ocean Common Carriers Serving US Atlantic & Gulf Ports*, 21 S.R.R. 845, 846 (FMC 1982) (emphasis supplied).)

The court's and the FMC's directive did not state how labor factors were to be considered or what weight should be given to them. The FMC's Administrative Law Judge sought to apply labor factors by interpreting the directive as requiring a balancing of benefits to the union and its members against detriments to NVOCC/consolidators. The ALJ concluded that the labor agreement was reasonable under Shipping Act standards and hence lawful. (App. C, 262a-263a)

The FMC reversed. Going beyond its earlier holding in *Sea-Land* that labor factors should be considered but given relatively little weight, the FMC held that labor factors should be excluded entirely from consideration even though the agreement had by then been upheld under the labor laws. It held that the reasonableness of a labor agreement affecting shippers of cargo

depended solely on consideration of those non-labor "transportation" factors that had been used in prior non-labor cases to justify the reasonableness of carrier tariff rates and governing rules. (App. B, 133a, 161a; *see* App. A, 16a)

The FMC relied on cases under the Interstate Commerce Act, on which the Shipping Acts were modeled. (*See* App. B, 161a-63a, *discussing Galveston Truck Line v. Ada Motor Lines*, 73 M.C.C. 617 (1957).) The FMC narrowly read this Court's directive to the ICC in *Burlington Truck Lines v. United States*, 371 U.S. 156, 172 (1962), that "[t]he policies of the Interstate Commerce Act and the labor act necessarily must be accommodated, one to the other" as requiring only that an agency issuing a cease and desist order prohibiting compliance with a labor agreement adjust the effective date of that order to accommodate labor considerations. (App. B, 75a, 172a, 192a.) Thus, the FMC's deference to labor considerations was confined to foregoing monetary penalties and allowing a 90-day grace period to permit reopening of the agreement for further collective bargaining. (App. B, 75a, 192a.)

The Court of Appeals' Decision

A different panel of the court of appeals than had remanded the FMC's decision in *CONASA* affirmed the FMC's ruling that all labor factors were to be excluded in passing on the Shipping Act reasonableness of a labor agreement. However, the court's holding went further. It held that an agency need not consider factors applicable under statutes not enforced by the forum agency unless the conduct being examined is directly mandated by another federal statute. (App. A, 47a-48a, 57a, 62a-64a) Here the labor laws did not actually compel the employers to accede to the Rules in the face of ILA strikes protected by the labor laws. Thus, the decision below concludes that federal labor law requiring employers to bargain in good faith with respect to a union demand for work preservation does not create a "true conflict" entitling labor factors to any consideration. (App. A, 47a-48a, 57a)

SUMMARY

The holding that a regulatory agency passing upon the "reasonableness" of a labor agreement that is lawful under the labor laws should exclude all labor factors from consideration conflicts with this Court's decision reversing the ICC's application of the Interstate Commerce Act to a hot cargo clause in a labor agreement. (*Burlington Truck Lines v. United States,* 371 U.S. 156 (1962).) An agency or a court must reconcile, insofar as possible, inconsistent policies under different statutes (see *Radzanover v. Touche Ross & Co.,* 426 U.S. 148, 153-54 (1976)). Adherence to this duty is a particular requisite in the labor area. As applied to administrative agencies, the holdings here construe that duty so narrowly that it applies only where another statute directly commands the conduct being reviewed. The holding further conflicts with decisions of this Court and several circuit courts of appeals that the "rule of reason" under the antitrust laws and similar substantive standards of the Shipping Act require giving weight to labor factors in passing on the "reasonableness" of a labor agreement. (*e.g. FMC v. Pacific Maritime Ass'n,* 435 U.S. 40, 61, 63 (1978); *New York Shipping Ass'n v. FMC,* 495 F.2d 1215, 1222 (2d Cir.) *cert. denied,* 419 U.S. 964 (1974).)

This controversy, in its labor law context, has twice been before this Court. (*ILA I* and *ILA II supra*) The issues and the economic consequences of their resolution are of national importance. The disposition of the case affects labor agreements and labor peace on all coasts and hence virtually all United States exports, imports and domestic offshore commerce. The same basic issues in this case were resolved in favor of the agreement under the labor laws in prior and extensive litigation between the same economic interests. A proper resolution of the Shipping Act merits of this dispute required the FMC to accord a presumption of lawfulness to the labor agreement and to give deference to the Labor Board's decision resolving substantially similar issues.

ARGUMENT

1. a. In *Burlington* the Court reversed an ICC grant of motor carrier operating authority to connecting carriers affected

by a hot cargo clause in the petitioning carriers' labor agreement. (*Burlington, supra,* 371 U.S. 156.) The ICC issued the authority under relaxed standards to enable the connecting carriers to have direct access to the cargo. The agency action reversed was far less intrusive in its impact on the labor bargain than is the case here and involved a labor agreement that was arguably unlawful under the labor laws and was clearly unenforceable by union action at the time of the ICC's decision. (371 U.S. at 169-70; *see Local 1976, United Brotherhood of Carpenters and Joiners v. Labor Board,* 357 U.S. 93, 106-07 (1958).)

Even though the hot cargo clause in the *Burlington* labor agreement had been clearly prohibited under the labor laws by the date of the Court's decision, so that not even an indirect conflict existed between the regulatory and labor statutes, the Court directed the ICC on remand to accommodate labor policies "in a most delicate area" because any order issued would have "important consequences upon the collective bargaining processes between the union and the employer. *The policies of the Interstate Commerce Act and the labor act necessarily must be accommodated, one to the other*". (*Id.* 371 U.S. at 172)(emphasis supplied).

Five Justices in *Burlington* went further and concluded that the ICC was precluded from applying the Interstate Commerce Act to interfere with rights under collective bargaining agreements that were lawful under the labor laws. Four specially concurring Justices who had joined in the Court's Opinion wrote that any ICC "cease and desist order should have been appropriately limited to requiring the carriers to provide service *in a manner and to the extent compatible with their labor agreements and the union's rights and duties under federal labor law*" (*Id.* at 177 (Goldberg, J., concurring) (emphasis supplied).) Justice Black, concurring and dissenting, similarly concluded: "Nothing in the Interstate Commerce Act gives the Commission power to prohibit carriers or unions under the circumstances shown by this record from doing that which the Labor Act permits them to do." (*Id.* at 175). The decisions below conflict both with the *Burlington* Court's directive to "accommodate" the labor laws and with the conclusion, to which five Justices subscribed, that the ICC

should not order relief inconsistent with obligations under a labor agreement lawfully enforceable by the union under the labor laws.

b. The court of appeals' decision also conflicts with more broadly applicable decisions of this Court under which quasi-judicial administrative agencies, as well as courts, are directed to reconcile two differing statutes and to seek to apply both where possible. (*See Radzanover v. Touche Ross & Co.*, 426 U.S. 148, 153-54 (1976); *Commonwealth of Pennsylvania v. ICC*, 561 F.2d 278, 292 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978) (ICC commended, citing *Radzanover*, for deferring to conflicting FMC Shipping Act regulation of rail/ocean joint tariffs).) The FMC referred to this principle as "fundamental" but found it inapplicable because, in the absence of a positive command in the labor laws to adopt the Rules, there was a "false conflict" between the two statutes. (App. B, 171a) The court of appeals narrowed the *Radzanover* rule drastically, holding that the FMC has no duty to accommodate the labor laws in the absence of a "true conflict," a term which it restrictively defined. Under the D.C. Circuit's test, an agency has no duty to consider any other statute or policy than the statute it administers unless the other statute directly commands (or prohibits) the precise conduct that the forum agency is evaluating for "unreasonableness". (App. A, 45a-49a, 57a-58a)[10]

The court of appeals' holding would be more consistent with the *Radzanover* rule if confined to situations in which the agency's own statute is reasonably explicit in prohibiting or commanding the conduct and where the conduct is merely permissive under, and is not positively encouraged by, the other statute. Here, however, the principle was applied to circumstances in which the agency's own organic statute does not expressly prohibit the particular conduct and merely permits the agency itself to create a prohibition through an ad hoc "unreasonableness" determination. Paradoxically, it is the labor laws, not the

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[10] Accordingly, the court of appeals emphasized that "[The labor laws] . . . most emphatically do not impose upon or guarantee to employers and workers specific terms and conditions of employment." (App. A, 57a)

Shipping Acts, which contain the more specific command. They require the parties to bargain in good faith[11] concerning wages, hours and working conditions, including union demands for work preservation.[12] They protect the union's right to bring all maritime commerce to a halt for months to compel acceptance of such demands, and they supply presidentially appointed mediators to help bring the parties to a compromise. (*See NLRB v. Insurance Agents Int'l, supra*, 361 U.S. at 489; App. A, 8a.) Taken together these features of the labor laws create, and are intended to create, a powerful combination of legal, economic and political forces which lead to negotiated compromises like the Rules.[13]

The court of appeals' black-and-white distinction between conduct that is compelled under another statute ("true conflict") and conduct that is voluntarily adopted ("false conflict") is arbitrary because it compels such a wide variety of situations to fall into a category in which no consideration at all is given to the other statute. It thus confuses the question of the proper weight which an agency should give to a non-forum statute or policy with the question whether *any* consideration is required. (*See* App. A, 47a-48a) In a complex economy, regulated persons are invariably subject to a multiplicity of statutory regimes in which the nature of conduct that is judged under general and substantially discretionary standards in one statute is encouraged and substantially shaped by the requirements and policies of another. Petitioners' position is not, as the court of appeals seemed to assume, that

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[11] The duty to bargain in good faith requires a sincere effort to reach a common ground and is judged by the parties' actual conduct. (*See NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153-54 (1956); *Reed & Prince Mfg. Co.*, 96 N.L.R.B. 850, 857-59 (1951), *enforced, NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953).)

[12] *Fibreboard, supra*, 379 U.S. at 210-11; *Road Sprinkler, supra*, 789 F.2d at 16.

[13] "One of the primary purposes of the [labor] Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation." (*Fibreboard, supra*, 379 U.S. at 211.)

mere compliance with one statute should automatically excuse compliance with a command in another. (App. A, 47a) The point is rather the proper weight to be accorded to another statute, a question that can only be resolved in light of the particular circumstances, including the extent to which the conduct is shaped, protected or regulated by the other statute, the importance of the other statute's objectives, the nature of the conduct and the degree of discretion conferred by the forum agency's own statute.

c. Finally, the decisions below conflict with decisions of this Court and several courts of appeal under the Shipping Acts and the antitrust laws that labor factors are to be considered under "reasonableness" standards on the merits after an outright threshold labor exemption is denied. Under the antitrust laws, labor factors are considered under the judicially created rule of reason, and under the Shipping Acts they are to be considered as part of statutory reasonableness tests. (*FMC v. Pacific Maritime Ass'n*, 435 U.S. 40, 61, n.19, 63 (1978), *citing Connell Construction Co. v. Plumbers & Steamfitters*, 421 U.S. 616 (1975), *and Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 688-89 (1965) (opinion of White, J.).)[14] As Justice Holmes wrote concerning a labor agreement challenged under the rule of reason, there is no "unreasonable restraint of trade" where "the purpose of the arrangement is to secure employment for all the men during the whole of the two seasons . . . ." (*National Ass'n of Window Glass Manufacturers v. United States*, 263 U.S. 403, 413 (1923).)

In *PMA, supra*, the Court held that a labor agreement fell outside a threshold Shipping Act labor exemption and had to be evaluated by the FMC under former section 15 of the 1916

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[14] A number of courts of appeals have required consideration of labor factors in testing labor agreements under the Sherman Act. *Berman Enterprises, Inc. v. International Longshoremen's Ass'n*, 644 F.2d 930, 936-37 (2d Cir. 1981), *cert. denied*, 454 U.S. 965 (1981); *Ackerman-Chillingworth v. Pacific Electrical Contractors Ass'n*, 579 F.2d 484, 491-92 (9th Cir. 1978) (en banc), *cert. denied*, 439 U.S. 1089 (1979); *Webster County Memorial Hospital, Inc. v. United Mine Workers*, 536 F.2d 419 (D.C. Cir. 1976).

Shipping Act under the same "reasonableness" standards and sections of the Act involved in this case. The Court, drawing an analogy to the consideration of labor factors on the merits required in antitrust rule of reason cases (*Id.* at 61, n.19), stated that the FMC could take labor factors into account on the merits in an "accommodation of the Shipping Act and the labor laws" (*Id.* at 63).

Similarly, the decision below conflicts with a decision of the Second Circuit which, after denying a threshold labor exemption in a Shipping Act case, directed the FMC that

> Plainly, the labor interests in the agreement do not evaporate upon a finding of FMC jurisdiction; *those interests demand the Commission's continuing attention throughout the process of investigating the status of the agreement under section 16 and 17. (New York Shipping Ass'n v. FMC,* 495 F.2d 1215, 1222 (2d Cir.), *cert. denied,* 419 U.S. 964 (1974)) (emphasis supplied).

The FMC and the United States were correct in representing to this Court in *PMA* that labor considerations must be weighed under the very provisions of the Shipping Act here at issue:

> Since maritime employers are permitted to bargain as a group, and since they are required to bargain about certain subjects, the resulting agreements *must have some exemption from successful challenge . . . under the substantive principles in sections 16 and 17 of the Shipping Act.* (Brief for the Federal Maritime Commission and the United States at 37, *FMC v. Pacific Maritime Ass'n.,* 435 U.S. 40 (1978); (emphasis supplied); *see* 18 F.M.C. at 213 (ordering paragraph 4).)

There appear to be no prior Shipping Act cases excluding any relevant factor, or any relevant federal law or policy, from the FMC's determinations as to whether conduct under the Shipping Acts is to be prohibited as "unreasonable". This Court affirmed the FMC's own decision to incorporate antitrust policy into the FMC's application of former section 15 of the 1916 Shipping Act so that the FMC had to weigh conflicting antitrust and Shipping Act considerations before deciding to apply an antitrust exemp-

tion to an agreement. Likewise it required the ICC to consider antitrust law policy in grants of carrier operating authority. (*FMC v. Aktiebolaget Svenska Amerika Linien,* 390 U.S. 238, 245, n.4 (1968); *see McLean Trucking Co. v. United States,* 321 U.S. 67, 79-80 (1944).) The FMC itself has incorporated obscure provisions of the 1920 and 1936 Merchant Marine Acts that it does not administer to make them Shipping Act commands.[15] It has used President Ford's anti-inflation policy as a "reasonableness" justification for giving lower rates to larger than to smaller shippers,[16] and it has treated labor factors and costs as relevant to the reasonableness of tariff provisions.[17] This case stands alone in excluding from consideration the only factors that are relevant to such a determination.

2. The consequences of this labor agreement and of the legal issues presented are of national importance as the Court's two grants of writs of certiorari in the Labor Board cases involving this agreement and the Court's acceptance of the *Burlington* case suggest. The labor issues in this case have dominated waterfront

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[15] Section 8 of the Merchant Marine Act of 1920 (46 U.S.C. § 867) directing the Secretary of War to study port conditions and to report port discrimination by railroads to the ICC has in past cases been incorporated by the FMC into affirmative Shipping Act commands applied to ocean carriers. (*See Intermodal Service to Portland, Oregon,* 17 F.M.C. 106, 126 (1973); *Overland & OCP Rates, supra,* 12 F.M.C. at 224 and 429 F.2d at 670; *see In Re: Far East Conference Amended Tariff Rule,* 20 F.M.C. 772, 774-75 (1978) (applying section 205 of the Merchant Marine Act of 1936 (46 U.S.C. § 1115) as Shipping Act jurisprudence).

[16] *Agreement 9955-1,* 18 F.M.C. 426, 487 (1975).

[17] (*See Imposition of Surcharge at United States Atlantic & Gulf Ports,* 10 F.M.C. 13, 24-25 (1966) (carriers' right to recover for strike costs); *Increased Freight Rates, Eastern and Western Territories,* 299 I.C.C. 429, 434, 451 (1956) (general rate increase justified by increased labor costs); *Overseas Freight & Terminal Corp.—Extra Charges Caused by Longshoremen Strike,* 8 F.M.C. 437 (1965) *aff'd sub nom. International Packers, Ltd. v. FMC,* 356 F.2d 808 (D.C. Cir. 1966) (carriers may recover for strike cost under bill of lading without a tariff provision).)

labor relations on all United States coasts[18] for the past twenty years. The issues are volatile ones because they arise in a context in which improvements in labor efficiency by the maritime employers, through containerization and otherwise, have greatly reduced overall work opportunities for longshoremen. (App. B, 77a-78a) Containerization also created the mobile conditions under which the type of labor- intensive, job producing cargo handling work that did remain could be readily transported to non-union facilities away from the docks. As the FMC recognized, its action gave the union an opportunity to reopen current collective bargaining agreements. (App. B, 192a)

Virtually all export, import and domestic offshore commerce of this country moves via ocean carriers, and a very large portion of that total is affected by this or similar labor agreements on all U.S. coasts. In the event the FMC's position were to prevail, the possible consequences include: (a) lawful industrial actions by the union disrupting commerce at a large cost to the economy and to the NVOCC/consolidators that would far exceed extra labor costs created by the agreement; (b) union actions directly enforcing the existing work award at a cost in disruption of trade that is likely to exceed extra labor costs created by the agreement;[19] (c) other fresh and costly bargaining demands by the union if the agreement is reopened and whose nature cannot be presently predicted. Of course it is also possible, but not likely, that the union will simply accept a defeat after two decades of struggle. Given the range and seriousness of the consequences, however, applying a test to a labor agreement that permits it no justification after the agreement has been upheld under the labor and antitrust laws is unduly rigid and constitutes a particularly unwise gamble

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[18] A comparable agreement resolving comparable problems on the west coast is still before the Labor Board and the FMC. *See California Cartage Co. v. NLRB,* 822 F.2d 1203 (D.C. Cir. 1987); *Petition No. P8-88—American Trucking Associations; Filing of Petition,* 53 Fed.Reg. 34836 (FMC Sept. 8, 1988).

[19] A pernicious result of the decisions below is that, because the labor bargain remains lawful under the labor and antitrust laws, it is enforceable by direct action by the union, which is not subject to FMC orders.

that large and extremely costly transportation consequences will not be the result.

The FMC's decision ignores the entire unfortunate history of similar governmental injunctive actions intervening in labor disputes and misses history's important lessons. One of the early applications of the labor injunction issued under non-labor statutes, but discredited and abandoned after passage of the Norris-Laguardia Act (29 U.S.C. §§ 101-109), occurred under the Interstate Commerce Act. The same theory of common carrier obligations relied upon by the FMC here for its cease and desist order directed to the employers' compliance with the labor bargain was used to enjoin union actions. In *Toledo, A.A. & N.M. Ry v. Pennsylvania Co.,* 54 Fed. 730, 741 (N.D. Ohio 1893) the court enjoined a railway strike as illegal per se under the Interstate Commerce Act, just as the courts at the time similarly applied the antitrust laws. (*See Duplex Printing Press Co. v. Deering,* 254 U.S. 443, 467-68 (1921); *In re Debs,* 158 U.S. 564, 586 (1895); F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 6-8, 212-13 (1963); H. Hovenkamp, *Labor Conspiracies in American Law,* 1880-1930, 66 Tex. L. Rev. 919, 950-65 (1988).) The FMC's decision and order creates a new form of administrative labor injunction directing employers not to comply with provisions in labor agreements lawfully won by union strike action and upheld by this Court as lawful under the labor laws.

3. A proper disposition of this case in which the FMC would give appropriate weight to labor factors is not difficult, complex or "illogical or intellectually untenable" as the FMC asserted in justification of its decision to give no weight to labor factors. (*See* App. B, 169a, see 168a-71a). At minimum, an agreement on a mandatory bargaining subject that is lawful under the labor laws should be given a strong presumption of "reasonableness" under the Shipping Acts. Further, there are prudential reasons why the FMC should defer to the result reached under the labor laws, just as the ICC elected to defer to the FMC and to Shipping Act regulation of rail/ocean intermodal tariffs. (*See Commonwealth of Pennsylvania v. ICC, supra,* 561 F.2d at 292) The essence of this case involves claims of prohibited secondary effects for which the labor laws provide both the appropriate substantive standards

for making decisions and remedies that apply to both parties to the agreement. By contrast the principal interests protected by the Shipping Acts are only indirectly affected by the labor agreement and those Acts do not govern the union's conduct. The dispute here, even in its commercial manifestation, is not one between regulated ocean carriers and the actual shippers and consignees of port area lcl cargo whose interests are protected by the Shipping Acts. Rather it is a conflict between unionized and non-unionized transportation service facilities each of which is regulated as such by the FMC and each of which performs the same cargo handling function that is in dispute.

Application of the foregoing presumption and prudential factor is likely to eliminate most of the need to apply substantive Shipping Acts standards, which address pricing and commercial practices, to labor agreements. As to those cases in which the FMC must still decide the merits of labor agreements the FMC should at least consider and give weight to likely alternatives to the labor agreement and to the usually very substantial transportation costs of upsetting such an agreement. If, as is almost certainly the case, the probable costs of alternatives to the Rules on Containers are very substantial and exceed harm demonstrated by the NVOCC/consolidators or by any actual shippers and consignees of cargo, the Rules should be upheld as reasonable.

CONCLUSION

The petition for a writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *et al.*,

Petitioners,

v.

FEDERAL MARITIME COMMISSION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE NON-FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court below erred in affirming the Federal Maritime Commission's determination that matters of labor-management policy, which are within the jurisdiction and expertise of the National Labor Relations Board, need not be considered in assessing the legality of a carrier's practice under the federal shipping laws.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-756

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *et al.*,

Petitioners,

v.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE NON-FEDERAL RESPONDENTS IN OPPOSITION

This case concerns the legality of the Rules on Containers (Rules), a set of practices embodied in shipping line tariffs that severely restrict the use of containers [1]

[1] "Containers. . . . are large metal receptacles that can be loaded (. . . 'stuffed') at off-pier facilities, . . . transported to a pier, and finally, loaded directly into specially designed 'container ships.' The containers can likewise be removed from the ship and transported directly to the ultimate consignee for unloading (or 'stripping')" (Pet. App. 6a). A consolidator combines the goods of various shippers into a single container and delivers the container to the pier (Pet. App. 7a).

by exporters, importers, consolidators, truckers and warehousemen—the very groups that the federal shipping laws protect against unreasonable and discriminatory practices by shipping lines.[2] The court of appeals, without dissent, upheld a unanimous Federal Maritime Commission (FMC or Commission) determination, rendered after an evidentiary hearing, that the challenged practices violate the federal shipping laws.

Because the Rules have their genesis in collective bargaining agreements that have been found lawful by the National Labor Relations Board,[3] petitioners insist that the FMC was obliged to balance labor considerations against the proscriptions of the shipping laws in deciding whether the Rules are lawful under the shipping laws. But when this Court considered the status of the Rules under the federal labor laws in *NLRB* v. *International Longshoremen's Association (ILA I)*, 447 U.S. 490 (1980), and *NLRB* v. *International Longshoremen's Association (ILA II)*, 473 U.S. 61 (1985), it admonished the NLRB not to look at factors outside the labor laws, such as the impact of the Rules on off-pier parties, in determining whether the Rules constituted valid terms of the ILA's collective bargaining agreements. Regulation of the employers "as common carriers," and assessment of the lawfulness of their tariffs under the shipping laws, were specifically left to the FMC—the agency assigned that responsibility by Congress (*ILA I*, 447 U.S. at 512; see also *ILA II*, 473 U.S. at 78). Accordingly, the FMC's

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[2] Shipping Act of 1984, 46 U.S.C. App. § 1701 *et seq.*; Shipping Act of 1916, 46 U.S.C. § 801 *et seq.*; Intercoastal Shipping Act of 1933, 46 U.S.C. § 843 *et seq.*

[3] The steamship lines' tariffs incorporate rules on containers, which are part of their collective bargaining agreements, along with additional provisions passing on labor costs and liquidated damages to shippers. *Council of North Atlantic Shipping Associations* v. *FMC (CONASA)*, 672 F.2d 171, 178 (D.C. Cir.), *cert. denied*, 459 U.S. 830 (1982).

determination that it could not modify the requirements of the shipping laws to accommodate the ILA-shipping line labor agreements, but could only consider labor issues in fashioning a remedy under the shipping laws, is plainly consistent with this Court's prior decisions and raises no issues that merit further attention.

PARTIES, OPINIONS BELOW, JURISDICTION AND APPLICABLE STATUTES

The references to the parties to the proceeding, to opinions below, to statements of jurisdiction and to applicable statutes as set forth in the petition for a writ of certiorari filed by petitioners International Longshoremen's Association *et al.*, on November 3, 1988, are hereby incorporated by reference herein.[4]

STATEMENT

1. *Impact Of The Rules On U.S. Commerce.* Rules restricting the use of containers in ocean shipping were first included in collective bargaining agreements between longshoremen and carriers operating from east coast ports nearly 20 years ago because longshoremen believed that their jobs were threatened by containerized cargo handling methods (Pet. App. 77a-79a). Both management and labor have acknowledged that the Rules have failed in their objective to "bring work back" to the piers, because the Rules did not address the underlying economic reasons for the decline in the longshoremen's hours: *i.e.*, outdated work rules, high wages and fringe benefits, increasing competition from lower cost ports and relocation of plants.[5] Indeed, shortly after the FMC's

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[4] Petitioners are the International Longshoremen's Association, AFL-CIO (ILA), and collective bargaining representatives for east coast shipping lines, including the Council of North Atlantic Shipping Associations (CONASA) and the New York Shipping Association, Inc. (NYSA).

[5] *Journal of Commerce*, Aug. 12, 1988 at 1A, col. 6 (John Bowers, President, International Longshoremen's Union, explained that ILA

decision was affirmed by the court of appeals, the ILA assured shippers that there would be "no disruptions in service," *i.e.*, no strikes, even though the container rules could no longer be enforced. Both sides publicly declared a willingness to explore alternatives that would make ILA labor more competitive.[6]

History confirms that the invalidation of the Rules will not result in chaos on the piers. The Rules have been in effect only sporadically during the past 20 years.[7] And, despite perennial threats of labor strife whenever the Rules' operation has been enjoined, as in the period from March 1981-1983, there have not been any such strikes.

Although the Rules have not retained enough work to satisfy longshoremen, they have imposed heavy burdens on exporters, importers, consolidators, distributors and others. The Rules deny the shipping public the "full advantage of the benefits of container shipping," *CONASA*, 672 F.2d at 177, thereby imposing a considerable disadvantage in comparison to counterparts in competing trading nations that do not operate under these impediments. The benefits of containers include lower rates and reduction of dockside delays, damage and pilferage. The use of containers also facilitates intermodalism—the

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members worked more man hours when the Rules were enjoined in the 1970's than under the Rules); *Traffic World*, Vol. 206 No. 6 pp. 82-83, May 12, 1986 (quoting Detweiler, President of CONASA); Congressional Information Bureau, Inc. (CIB), Vol. 92, No. 220, pp. 18-19, Nov. 16, 1988 (quoting Anthony J. Tozzoli, President, NYSA). It is widely recognized that the container rules foster uneconomic operations. See *ILA II*, 473 U.S. at 82-83, 90 (Rehnquist, J. dissenting) *ILA I*, 447 U.S. at 511, 526-27 (Burger, C.J., dissenting).

[6] *Journal of Commerce*, Aug. 12, 1988 at 1A, col. 6.

[7] *Journal of Commerce*, Nov. 1, 1988 at 2B, col. 2. It was only when the union decided to seek review in this Court that the carriers announced that they would enforce the Rules. *Journal of Commerce*, Oct. 24, 1988 at 10B, col. 3.

through movement of cargo over several transportation modes. Pet. App. 6a-7a; *ILA I*, 447 U.S. at 494-95; *CONASA*, 572 F.2d at 174.

Simply stated, the Rules require that a shipping container be loaded or unloaded by ILA labor at the pier if the container's origin or destination is within 50 miles of an east or gulf coast port. Ocean carriers must refuse to supply containers without charge to persons who engage in off-pier consolidations within 50 miles of these ports. "Qualified" shippers (*i.e.*, persons whose containers are loaded by their own employees at their own facilities) are the only shippers exempt from these restrictions.[8] If non-exempted cargo arrives at the pier already loaded in containers, the container must be unloaded (stripped) and reloaded (stuffed) by ILA longshoremen; monetary penalties also are assessed against the non-"qualified" shipper or consolidator. We next discuss the discriminatory impact of the Rules upon different types of affected businesses.

a. *Exporters*—Several simple illustrations demonstrate the hardship and discrimination that the Rules impose upon small exporters. At a public warehouse near the Port of Boston, a small exporter's cargo is efficiently loaded into a container, filling more than 90 percent of its capacity. Because Boston does not have carrier service to the container's particular destination, the container is transported to the Port of New York, some 220 miles away. At the New York pier, the container is stripped by ILA labor and the packages are then restuffed in the same container at a cost that varies from $200 to $325 per container (Pet. App. 9a). Because the ILA pier workers do not load as efficiently as the exporter's employees, the exporter may need a second container, thus

[8] Shipping lines provide empty containers without charge to shippers for off-pier loading to reduce dockside congestion, labor costs and paperwork. *CONASA*, 672 F.2d at 174. These same benefits are realized when containers are supplied to consolidators.

incurring double freight charges as well as problems in tracing the shipments and coordinating delivery. *CONASA*, 672 F.2d at 177. The exporter suffers this delay, expense and increased risk of loss[9] because the initial consolidation took place within 50 miles of an ILA port, Boston (Pet. App. 182a-183a).

A second exporter loads his container at a public warehouse 220 miles due west of New York. When this container reaches the pier, it is loaded aboard the vessel without incident because the consolidation was not accomplished within a 50-mile radius of an ILA port.

A third exporter, located within 50 miles of the port, but large enough to maintain a warehouse, loads his container in his own facility using his own employees. His merchandise is also loaded aboard the vessel without hindrance (Pet. App. 119a, 182a-183a).

b. *Importers*—The Rules impose similar burdens on small importers. If an importer is large enough to have his own warehouse within the port area, his container is released from the pier and the merchandise may be distributed from his warehouse immediately. Otherwise, the importer has two options. He may have the container stripped at the pier, which exposes the goods to loss, damage and delay. Alternatively, the importer may have the container taken to a public warehouse. In that event, the merchandise, which is frequently of great value, cannot be removed from the public warehouse for 30 days. The importer cannot even pass title to the goods during that period (Pet. App. 182a-183a, 189a).[10] Of course,

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[9] During the FMC hearings, petitioner Sea-Land, the largest U.S. flag carrier, admitted that rehandling of the cargo under the Rules increased the risk of pilferage, and that when on-pier stuffing and stripping are eliminated, pilferage, damage and loss are almost nil.

[10] These restrictions are imposed under the carriers' tariffs even though their contracts of carriage with the importers ended at shipside with the off-loading of the container.

increased costs to the importer are reflected in higher prices to U.S. consumers.

c. *NVOCCs*—In the 1984 Shipping Act, Congress recognized the non-vessel operating common carrier by water (NVOCC) as a legal entity that is classified as a shipper in its relationship with a steamship line. 46 U.S.C. App. § 1702(17). NVOCCs stuff the shipments of smaller exporters into a container, at off-pier locations, ship the container by vessel and charge rates within the margin between the steamship line's rates applicable to break-bulk shipments (which the smaller shippers would otherwise have to pay) and lower "freight-all-kinds" rates governing consolidated container loads (Pet. App. 6a-7a, 173a-174a). Notwithstanding petitioners' derogatory comments about NVOCCs (Pet. 4), the "benefits of NVO's to smaller shippers, carriers and the commerce of the United States has long been recognized by Congress, the courts and the Commission" (Pet. App. 174a). Among such benefits are NVOCCs' lower rates, shorter delivery times, the need for only a single bill of lading, reduced packing expenses, substantially less loss, damage and pilferage and the provision of specialized services not provided by the steamship lines, all of which have particular value to the small shipper. *CONASA*, 672 F.2d at 174.

The Rules nevertheless prohibit shipping lines from furnishing containers to NVOCCs and other consolidators. To stay in business, an NVOCC or other off-pier consolidator must lease or purchase containers (at a cost of $200-300 for a one-way voyage). Pet. App. 8a-9a. As a result, many who "previously operat[ed] within the 50-mile zone have been severely affected and in some cases have been forced to cease operations." *CONASA*, 672 F.2d at 177. "By contrast, carriers furnish containers at no charge to 'qualified' shippers or consignees, as well as to shippers and manufacturers outside the

50-mile zones" (Pet. App. 9a). Accordingly, NVOCCs who compete with the shipping lines for cargo within the 50-mile zone are subjected to substantial extra costs and shipping delays. Pet. App. 8a-9a; *CONASA*, 675 F.2d at 188.

d. *Trucking Firms and Public Warehousemen*—Trucking firms move containers to and from the piers. As a result of the Rules, they cannot load and reload containers off-pier to meet weight, safety or delivery requirements. *ILA I*, 447 U.S. at 501. Many truckers that provide consolidation services have lost revenue because their customers have either hired firms located beyond the 50-mile limits or chosen to do the work themselves. Likewise, public warehousemen located near port cities cannot provide the full range of their customary delivery services.

e. *U.S. Ports, Carriers and Other Persons*—Containerized traffic is diverted to Canadian and non-ILA U.S. ports, causing ILA ports, U.S. flag carriers, forwarders and customs brokers to lose business.

2. *History Of Litigation.*—a. *Proposed Rules and CONASA.* In 1973, concern over the Rules' adverse impact on commerce between the United States and Puerto Rico prompted a FMC investigation of the implementing tariffs and carrier practices. *Sea-Land Service Inc.—Proposed Rules on Containers (Proposed Rules)*, 21 F.M.C. 1, 14 (1978). CONASA, an intervenor, claimed that the validity of the Rules was confided exclusively to the NLRB and, therefore, exempt from regulation under the shipping laws. After an evidentiary hearing, the Commission determined that it could properly exercise jurisdiction over tariff provisions that unreasonably burden and discriminate against exporters, importers and consolidators, regardless of the provisions' labor origins, and it found these tariffs unlawful.

On a petition for review limited to the jurisdictional question, the court of appeals unanimously confirmed the FMC's authority to determine whether tariff provisions incorporating the Rules on Containers violate the obligations imposed upon common carriers by the shipping laws. *CONASA*, 672 F.2d at 173. Making no judgment on the substantive merits of the Rules, the court remanded for additional consideration in light of "intervening judicial decisions." *CONASA*, 672 F.2d at 173, 179 n.67, 189.[11] Thus, *CONASA* did not approve or disapprove the FMC's finding of illegality. Neither, as the same court subsequently made clear, did it "determine what standards the Commission was required to apply in its investigation" (Pet. App. 35a-36a). *CONASA* did, however, point to the basic difference in the function and effect of the Rules in the carrier/union and carrier/shipper contexts, explaining that the NLRB and FMC were each "required to ask" different questions. *CONASA*, 672 F.2d at 181. This Court denied certiorari. 459 U.S. 830 (1982).

b. *The Current Proceeding Before the Commission*— In early 1981, the Rules were briefly reimplemented for two months. Complaints by injured parties prompted the FMC to open a broad-scale investigation of the allegedly discriminatory and unreasonable carrier practices under these tariffs. After an initial procedural phase, an Administrative Law Judge (ALJ) received first-hand evidence from NVOCCs, forwarders, warehousemen, truckers and custom brokers that the carriers' practices imposed costly burdens on their operations and impeded the efficient exportation and importation of merchandise.

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[11] The court of appeals vacated only the FMC's order discontinuing Docket 73-40, not the decision itself. *Proposed Rules* was held open awaiting a final decision in Docket 81-11. The court took this action so that the FMC might consider whether labor policy considerations should be factored into a substantive Shipping Act analysis of the Rules *before* that issue was considered by a reviewing court (Pet. App. 36a).

Proponents of the Rules presented their evidence of "labor policy considerations," the agency having asked the parties to address that issue before deciding whether it had any significance under the shipping laws. Pet. App. 144a-146a.

In his Initial Decision, the ALJ acknowledged that the "sole basis" of the tariff provisions incorporating the Rules is the "preservation of work of members of the ILA," that the Rules were "not promoted by conditions attendant to the transportation of the cargoes affected by them" and that they are "arbitrary in the sense that the nature of the commodity has no bearing on the application of the rule" (Pet. App. 250a). The ALJ found that, under established transportation considerations, the Rules would be held unlawful (Pet. App. 251a).

Faced with "real difficulty" in "line drawing" between the competing arguments about the relevance of the carriers' labor agreement (Pet. App. 241a), the ALJ "proposed a new methodology" (Pet. App. 150a), balancing the harm to the shipping public against the benefits purportedly derived by the ILA (Pet. App. 241a-242a). Although the ALJ made no findings of the extent of actual benefits realized from the Rules, he concluded that no violations of law had been established.

The Commission rejected this "radically new" approach on the ground that it negated the basic common carrier obligation to provide transportation in a reasonable and non-discriminatory manner (Pet. App. 166a). Applying "traditional transportation factors," the FMC concluded that the tariff rules were facially defective because they imposed economic burdens that bore no relation to the nature of the commodity being moved or the service provided.[12] The FMC observed that the evidence

[12] A carrier performs the same service—transporting a loaded container aboard its vessel—whether or not the container is loaded by ILA labor at pierside. The use of longshore labor does not make labor a "transportation factor." Labor, like fuel or terminal rent,

of actual injury "supports and confirms the evidence provided by the text of the Rules themselves" (Pet. App. 175a-176a). Consequently, the FMC held that the disparate treatment of shippers tendering off-pier loaded containers, which caused shippers to suffer additional delay, expenses and fines, constituted unreasonable and discriminatory shipping practices (Pet. App. 179a-189a). Moreover, it held that the denial of containers to cargo consolidators unreasonably discriminated against them inasmuch as they were denied a transportation facility made freely accessible to other shippers (Pet. App. 176a-179a).

After carefully reviewing its legislative mandate and the relevant judicial decisions, the FMC concluded that the shipping law objective of promoting nondiscriminatory fair practices for ocean commerce need not and should not be altered to accommodate labor interests in protecting jobs. Prior judicial decisions, the FMC held, "show that a common carrier may not bargain away [statutory] duties in a labor agreement and then defend its actions on the grounds that it served a greater public interest by avoiding a strike and preserving 'labor peace'" (Pet. App. 163a). The Commission noted that "common carriers in other transportation modes have not been excused from their statutory obligations on the basis of collective bargaining agreements with their employees" (Pet. App. 163a-164a). To permit the collectively bargained Rules to excuse the carrier's obligations would, it explained, "license . . . unlawful practices" because such practices could always be shielded by claims of "labor peace" (Pet. App. 164a). The Commission rejected a methodology that would permit carriers to bargain with the union without any incentive to safeguard

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is simply one of many costs to the carrier reflected in the freight rate. Cases cited by supporting respondent, West Gulf Maritime Association (WGMA), provide examples of this treatment of labor costs. Br. 16 n.17.

their fundamental common carrier obligations (Pet. App. 163a-164a). Furthermore, such a methodology would "require the Commission to make findings of fact outside its area of expertise" (Pet. App. 168a).

The agency did, however, accommodate "labor interests" in fashioning a remedy that would "avoid any unnecessary disruption of the collective bargaining process by giving the parties ample time to accommodate ILA's interests in some manner other than the present Rules on Containers" (Pet. App. 192a, 172a).[13] Following the court of appeals' affirmance, the carriers appeared to be prepared to undertake this mission, until the ILA's decision to petition for certiorari derailed their efforts.

3. *The Decision Below.* A unanimous panel of the court of appeals affirmed. Applying the standard of review mandated in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Counsel*, 467 U.S. 837, 842-45 (1984), the court below gave appropriate deference to the FMC's "interpretation of the statute it is entrusted to administer." First, the court agreed with the FMC's determination that, absent consideration of labor factors, the Rules could not be upheld under the statute because they could not be justified in transportation terms (Pet. App. 30a-31a). Furthermore, the court held:

- the FMC's decision not to take labor factors into account except in fashioning a remedy followed the guidelines established by this Court in *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156 (1962); *Local 1976, International Brotherhood of Carpenters and Joiners* v. *NLRB* ("*Sand Door*"), 357 U.S. 93 (1958); *Southern Steamship*

[13] To further minimize any possible encroachment on collective bargaining, the FMC eliminated the question of penalties for violation of the statutory provisions at issue, restricting its remedy to a cease and desist order against further tariff publication and enforcement of the unlawful provisions. Accord, *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 165, 172-74 (1962).

Co. v. *NLRB*, 316 U.S. 31 (1942); and *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944) (Pet. App. 40a-58a);

- the FMC reasonably interpreted those guidelines as requiring it to decide whether Congress had intended it to take account of labor policies within the framework of the Shipping Act (Pet. App. 56a-57a);
- the FMC's refusal to excuse "obvious" shipping law violations because of a carrier's "obligations under a collective bargaining agreement" or the "threat of labor unrest" was neither unreasonable nor inconsistent with its shipper-protective statutory mandate (Pet. App. 31a, 60a-62a); and
- *ILA I* and *ILA II* "made it clear" that independent consideration of the labor law and shipping law issues is "possible" (Pet. App. 62a).

Insofar as the ILA's "right to bargain to retain work" is concerned, the court of appeals explained that labor and management remained free to "negotiate mutually acceptable work preservation terms that conform to [the FMC's] decision" (Pet. App. 57a). The court observed, however, that "[i]t is not the national labor policy to allow otherwise unlawful activity merely because an employer and a union have agreed to it in mandatory collective bargaining" (Pet. App. 58a).

REASONS FOR DENYING THE WRIT

The court of appeals unanimously upheld the unanimous determination of the expert administrative agency —the FMC—that the Shipping Act does not require the FMC to consider labor factors in determining whether a common carrier has violated its obligation to provide nondiscriminatory service. That decision follows from this Court's rulings in *ILA I* and *ILA II* and other cases and does not conflict with any decision of this Court or any other court of appeals. Moreover, the court of appeals'

decision is correct. Petitioners' contrary rule would defeat the goals of the Shipping Act by freeing carriers to engage in discriminatory practices with abandon as long as a carrier first incorporates those practices into its labor contracts. For all of these reasons, review by this Court is not warranted.

1. The FMC's determination that its statutory mandate does not authorize consideration of labor policies raises no new or substantial legal issues. That result was clearly forecast in *ILA I* and *ILA II* when this Court forcefully criticized the NLRB for considering shipping law policies in determining whether the Rules were a valid work preservation agreement under the labor laws, and reserved the "difficult and complex" transportation issues for consideration by the FMC. *ILA I*, 447 U.S. at 512, 507, n.22; *ILA II*, 473 U.S. at 79.[14]

Moreover, the factors favoring review by this Court in those cases are not present here. *ILA I* and *ILA II* each involved disagreements between the expert agency and the reviewing court; in addition, *ILA I* involved conflicts among the courts of appeals and a divided panel of the District of Columbia Circuit. See 447 U.S. at 493. None of those circumstances exists in this case. The question presented is of limited significance, involving ocean carriers subject to special obligations imposed by the shipping laws and a labor agreement to implement obsolete and ineffective container rules. This Court having twice delimited the responsibilities of federal agencies exercising specially focused oversight over activities involving the Rules in question, and the FMC and court of appeals having acted in harmony with its views, no further review is required.

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[14] Contrary to petitioners' intimations (Pet. i, 9), this Court previously stated only that the shipping law issues were important. It did not state that those issues necessarily required plenary consideration by the Court.

2. The decisions below are plainly correct and consistent with this Court's precedents. *McLean Trucking* makes clear that the "immediate frame of reference" of a transportation agency assessing the obligations of a common carrier is its own legislation and the policies expressed in that legislation. 321 U.S. at 80. Whether the agency must make any "adjustments" of its regulatory behavior to accommodate the policies of another regulatory regime depends on "the extent to which Congress indicates a desire to have those policies leavened or implemented in the enforcement of the various specific provisions of the legislation with which the [agency] is primarily and directly concerned." [15] Thus, the Court in *McLean Trucking* required the ICC to consider antitrust effects in approving mergers because those concerns were incorporated into its organic legislation as part of the national transportation policy. 321 U.S. at 85-86.

In this case, by contrast, this Court has twice ruled that the shipping and labor policies involved in assessing petitioners' container rules are separate and distinct, and that transportation policies are "irrelevant" to the labor law analysis. *ILA I*, 473 U.S. at 507 n.22; *ILA II*, 473 U.S. at 78. This Court called it "fundamental error[]" when the NLRB tried to harmonize these diverse statutory schemes by considering the Rules' effect on outside persons, instead of focusing solely on the collective bargaining objectives of the labor laws. *ILA II*, 473 U.S. at 79.

When the FMC applied these same principles, it found that the policies of the shipping and labor laws differ so "fundamentally" that the proposed incorporation of labor interests in its Shipping Act determination would mean the "effective removal of any protection for shippers" and "abandon[ment of its] fundamental Shipping Act

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[15] This directive was repeated in *Denver & Rio Grande Western R. Co.* v. *United States*, 387 U.S. 485, 493-94 (1967).

obligations" (Pet. App. 168a-169a, 171a-172a).[16] It further found that there was no "reasonable or feasible methodology" by which it could accommodate labor interests in its substantive analysis (Pet. App. 171a). Any such attempt would trespass on another agency's jurisdiction and would cause the FMC to act in an area where it lacked expertise.[17] Accordingly, it properly concluded that labor policies should be considered only in fashioning a remedy so as to minimize interference with the collective bargaining process.

3. The resulting FMC decision not to excuse the carrier's Shipping Act violations simply because the underlying collective bargaining agreement had been held lawful under the labor statutes follows a familiar path. *Sand Door* recognized that a common carrier may "fail in [its] obligations" to provide nondiscriminatory service under a transportation statute when carrying out its obligations under a lawful collective bargaining agreement. 357 U.S. at 110-111; see also *Galveston Truck Line Corp.* v. *Ada Motor Lines, Inc.*, 73 M.C.C. 617 (1957) (a common carrier is not relieved of its service obligation by a "hot cargo" clause), cited with approval in *Sand Door*, 357 U.S. at 109. And, in *Burlington Truck*, this Court expressly acknowledged that the ICC

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[16] The divergence of labor and shipping law policies is well-established. The primary objective of labor policy is to ensure unfettered collective bargaining, without regard to the harm to other persons. *Volkswagenwerk Aktiengesellschaft* v. *FMC*, 390 U.S. 261, 312-16 (1968) (Douglas, J., dissenting). The policies to which the FMC must give effect are the promotion of "an efficient and economic transportation system" and the protection of shippers. 46 U.S.C. App. § 1701; *CONASA*, 672 F.2d at 191.

[17] *Burlington Truck* warns against attempts to accommodate another statute that would require an agency to "trench upon [another's jurisdiction, and, because of lack of expert competence," contravene its policies. 371 U.S. at 173. See also *Volkswagenwerk*, 390 U.S. at 286 (Harlan, J., concurring) ("the Commission will not improperly be brought into labor matters where it does not belong").

could enforce a common carrier service obligation against carriers constrained by labor agreements.[18] At no time in the course of the lengthy proceedings before the FMC have petitioners cited a single case in which a common carrier was permitted to interpose its collective bargaining obligations between the public and its statutory duties (Pet. App. 60a, 163a).

4. The court of appeals broke no new ground when it held that the FMC acted reasonably in declining to consider labor factors in making its substantive shipping law determinations. Before approving the FMC's decision, the court ascertained that the agency had first "engage[d] in a careful analysis of the possible effects those alternative courses of action may have on the functioning and policies of other statutory regimes, with which a conflict is claimed" and then "explain[ed] why the action taken minimizes, to the extent possible, its intrusion into policies that are more properly the province of another agency or statutory regime," as required by *Burlington Truck* (Pet. App. 53a, 56a).

Thus, the court of appeals determined that the FMC's analysis was proper and that its choice was not "inconsistent with the statutory mandate" and did not "frustrate the policy that Congress sought to implement." Once the court had completed the review mandated by *Chevron*, it quite properly affirmed the FMC's determination (Pet. App. 61a).

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[18] In reversing the ICC's choice of remedy, a plurality of the Court did not indicate that the ICC should require carriers to perform their service obligations only to the extent that those obligations did not conflict with their obligations under collective bargaining agreements. The language in Justice Goldberg's concurring opinion, cited in supporting respondents' brief (Br. 16-17), refers to the subsequent passage of legislation invalidating the hot cargo clauses that had caused the service disruptions. At that point, Justice Goldberg explained, the ICC could have issued a cease and desist order "under which no conflict could or would have arisen." 371 U.S. at 177.

5. The court of appeals did not ignore, or limit, the FMC's obligation to consider the effects its actions might have on the policies of other statutes and to tailor its remedy to minimize them. Rather, based on this Court's decisions, it explained that a reviewing court should substitute its own accommodation (in fashioning a remedy) for the agency's determination only if there is a "true conflict" between rights and obligations established in the agency's own statute and in another statute, or if the agency has frustrated a congressional directive to consider other policies (Pet. App. 47a-56a). Neither of those circumstances is present here. Petitioners thus seriously misstate the obligations of an agency when they speak (Pet. 14) of a "duty to harmonize" in all situations.[19] In sum, the court of appeals did not fashion a novel test;

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[19] The cases cited by petitioners and WGMA do not establish a duty by an agency to compromise the substantive requirements of its own statutes in favor of conflicting policies in another statute. In *FTC* v. *A.P.W. Paper Co.*, 328 U.S. 193, 202 (1946), both statutes were "directed towards protection of the public against deceptive practices," and could be harmonized without conflict. *Southern Steamship*, 316 U.S. 31, focused on the abuse of discretion in giving a remedy. As this Court explained in *Sand Door*, there was no "suggestion [in *Southern Steamship*] that the Board should abandon an independent inquiry into the requirements of its own statute and mechanically accept standards elaborated by another agency under a different statute for wholly different purposes." 357 U.S. at 111. *United States* v. *Borden Co.*, 308 U.S. 188 (1939), *Morton* v. *Mancari*, 417 U.S. 535 (1974), *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), and *Radzanauer* v. *Touche Ross & Co.*, 426 U.S. 148 (1976), are cases in which this Court rejected claims that statutes were repealed by implication. Moreover, neither WGMA nor petitioners explain how the conflicting labor policies could be "harmonized" with Shipping Act policies. The FMC considered the possible alternatives and concluded that it could not safeguard the shipping interests it is required to protect under any proposed accommodation (Pet. App. 164a-172a). The accommodation petitioners advocate would result in the effectve repeal of the Shipping Act protections.

it simply used a different formulation to describe settled Supreme Court doctrine.[20]

6. Petitioners argue (Pet. 14, 1-2; Br. 15-16) that by forbidding "unjust" and "unreasonable" discrimination and practices, Congress signaled a desire for statutory accommodation—or, at the least, established a "discretionary" standard of such elasticity that it was an abuse of discretion for the agency not to consider labor factors.

In fact, as the cases cited by petitioners show (Pet. 14), the need for an agency to consider the policies of another statute arises from *specific* provisions of its own or the other legislation. See *Denver & Rio Grande Western R. Co.* v. *United States*, 387 U.S. 485 (1967) (Section 11 of the Clayton Act and the national transportation policy); *McLean Trucking Co.*, 321 U.S. at 86 ("objectives of the national transportation policy"); *Community Television of Southern California* v. *Gottfried*, 459 U.S. 498, 509 n.14 (1983) ("general words 'public interests' in the Communications Act are not sufficient").[21]

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[20] Even if the court of appeals could be said to have developed a new approach, further review should await a case in which the outcome under this Court's precedents is not as clearly correct as the decision here.

[21] Conversely, "capacious" language does not import authority to enforce or exempt other statutes. *NAACP* v. *FPC*, 425 U.S. 662 (1976); *Silver*, 373 U.S. 341; see also *California* v. *FPC*, 369 U.S. 482 (1962). It should be noted that the pertinent provisions of the Shipping Act relating to carrier practices do not contain the terms "public interest," "lawful object" or "just and adequate," which are used to illustrate petitioners' argument (Pet. 14). Moreover, the Shipping Act was amended in 1984 to remove the "public interest" standard under which the Commission considered the policy of other statutory schemes such as the antitrust laws in approving agreements among carriers. H.R. Rep. No. 600, 96th Cong., 2nd Sess. (1984). For these and other reasons, the court of appeals found inapposite (Pet. App. 57a) the cases cited by WGMA (Br. 14-15). *FMC* v. *Pacific Maritime Ass'n*, 435 U.S. 40 (1978), and *New York Shipping Ass'n* v. *FMC*, 495 F.2d 1215 (2d Cir.),

The proscriptions of the Shipping Act are not discretionary in the sense that the agency may excuse a violation for reasons beyond the Act's objectives. Their legislative purpose was to "protect the shipping industry's customers, not members of the industry." *Boston Shipping Ass'n* v. *FMC*, 706 F.2d 1231, 1238 (1st Cir. 1983); *Eden Mining Co.* v. *Bluefields Fruit & S.S. Co.*, 1 USSB 41, 45 (1922) ("duty . . . to serve the public impartially"). The Shipping Act prohibition against unjust and unreasonable carrier practices, and its purpose, closely parallel requirements of the Interstate Commerce Act that a carrier must satisfy notwithstanding its obligations under a collective bargaining agreement or threats of labor unrest. See *Burlington Truck*, 371 U.S. at 161, and *Galveston*, 73 MCC at 625-26. The court of appeals properly found that an interpretation of the Shipping Act that followed established transportation law was entirely reasonable (Pet. App. 60a-62a).

7. Petitioners' real criticism of the deferential standard of review mandated by *Chevron* and followed by the court of appeals is that the court did not require the FMC to subordinate shipping policies to labor law policies. In other words, petitioners contend that the FMC should defer Shipping Act enforcement to the result reached under the labor laws—*i.e.*, it should grant a de facto exemption from the Shipping Act, contrary to *CONASA*'s holding that there is no basis in law for such an exemption.[22]

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cert. denied, 419 U.S. 964 (1974) ("dictum" related to a procedure that was "dropped from the law by the 1984 Act because of the problems it created for collective bargaining").

[22] WGMA says so explicitly (Br. 18). As far as petitioners are concerned, harmonization is strictly a one-way street. In *ILA I* and *ILA II*, they objected to the NLRB's considering harm to offpier interests and did not propose that shipping factors be taken into account in making labor determinations.

This view—that the union's interest in negotiating a particular work preservation formula should take precedence over the FMC's mandate to advance commerce and protect shippers—finds no support in either statute or case law.[23] It runs directly counter to the holdings of this Court that there is no established right or congressional policy embodied in the labor statutes that insulates any particular collectively bargained benefit from the requirements of other statutes. *United Mine Workers* v. *Pennington*, 381 U.S. 657, 664-66 (1965). Contrary to respondents WGMA's claim (Br. 13), the labor laws did not require, or "substantially shape[]," or even "encourage[]" the carriers to agree to the particular work preservation scheme embodied in the Rules. Because a union and an employer "must bargain does not mean that the agreement reached may disregard other laws." *United Mine Workers*, 381 U.S. at 665; *Volkswagenwerk*, 380 U.S. at 286-87 (Harlan, J., concurring). There is simply no reason why the carriers could not comply with the labor laws *and* the shipping laws *and* any other applicable statutes in their collective bargaining activities.

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[23] Petitioners criticize the court of appeals for failing to recognize work preservation as a "labor law right" that the FMC was obligated to consider as a justification for the carriers' discriminations (Pet. 10-11). The court put this claim in proper context when it explained that employees "have a right to bargain to retain work" but that this right is not a "substantive right" to retain that work and that the "carriers were not, under the express or implied terms of the labor laws, obligated to accede to the union's work preservation demands" (Pet. App. 57a-58a). No question about the status of work preservation under the national labor laws is raised by its decision. Nor is there any conflict with that same circuit's decision in *Sheet Metal Workers Int'l Ass'n Local 223* v. *NLRB*, 498 F.2d 687, 697 (D.C. Cir. 1974), or *Canada Dry Corp.* v. *NLRB*, 421 F.2d 907, 910 (6th Cir. 1970), which concern the unions' right to bargain for work preservation protections.

8. During the 20 years in which the validity of the Rules has been the subject of litigation, the carriers and the ILA have insisted that the Rules are lawful and that labor unrest and the disruption of vital shipping services would be the consequence of their invalidation. Now these shopworn fears are urged in support of the needless further involvement of this Court. In fact, implementation of the Rules has been halted in the past and no strike occurred. Moreover, it is clear from the initial reactions to the court of appeals' decision by both the carriers and the union that both sides recognize that the Rules have not achieved their work preservation purposes and that it is possible to put in place alternative labor protection mechanisms. The Rules now represent nothing more than a bargaining chip in the current negotiations between the carriers and the union. But they also are an artificial and significant restraint on our foreign commerce and an unnecessary obstacle to lower cost ocean liner services. By focusing petitioners' efforts on negotiating a prompt, workable agreement that respects the rights of the shipping public as well as the dock workers, denial of this petition will greatly serve the public interest.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER TERM, 1988

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, ET AL., PETITIONERS

v.

FEDERAL MARITIME COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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1988

QUESTION PRESENTED

Whether the Federal Maritime Commission erred in concluding that certain discriminatory tariff practices by common carriers subject to the Commission's jurisdiction violated the Shipping Acts, even though those practices implemented work preservation agreements valid under the National Labor Relations Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-756

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, ET AL., PETITIONERS

v.

FEDERAL MARITIME COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-69a) is reported at 854 F.2d 1338. The opinion of the Federal Maritime Commission (Pet. App. 70a-201a) is unofficially reported at 24 Shipping Reg. (P & F) 411. The opinion of the administrative law judge (Pet. App. 202a-268a) is unofficially reported at 22 Shipping Reg. (P & F) 1660.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1988. The petition for a writ of certiorari was filed on November 3, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In *NLRB* v. *International Longshoremen's Ass'n*, 473 U.S. 61 (1985) (*ILA II*), and *NLRB* v. *International Longshoremen's Ass'n*, 447 U.S. 490 (1980) (*ILA I*), this Court held that the "Rules on Containers" negotiated between petitioner, the International Longshoremen's Association (ILA), and maritime employers' organizations on the Atlantic and Gulf Coasts, were lawful work preservation agreements under the National Labor Relations Act, 29 U.S.C. 151 *et seq.* In each decision, however, the Court made clear that the validity of the Rules on Containers under the Shipping Acts was not at issue.[1] See *ILA I*, 447 U.S. at 512; *ILA II*, 473 U.S. at 70 n.10. In this case, the Federal Maritime Commission (Commission) held that practices by common carriers implementing the Rules on Containers, as embodied in tariffs filed with the Commission, violated the Shipping Acts, because those practices discriminated against certain shippers and cargo handlers without regard to justifiable transportation considerations. The Commission accordingly enjoined petitioners, the common carriers, from engaging in those practices. The court of appeals unanimously affirmed the Commission's decision. Petitioners, joined by respondent West Gulf Maritime Association, principally contend that the Commission, by striking down the carriers' practices under the Shipping Acts, has impermissibly undermined

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[1] The term "Shipping Acts" refers collectively to the Shipping Act, 1916, as amended by the Maritime Labor Agreements Act of 1980, 46 U.S.C. 801 *et seq.*, the Intercoastal Shipping Act, 1933, 46 U.S.C. 843 *et seq.*, and the Shipping Act of 1984, Pub. L. No. 98-237, 98 Stat. 67 (to be codified at 46 U.S.C. App. 1701 *et seq.*). Congress enacted the 1984 Act while this case was pending before the Commission. The Shipping Act of 1984 superseded the 1916 Act with respect to international trades, but made no substantive changes in the provisions applicable here.

the longshoremen's work preservation rights guaranteed by the National Labor Relations Act.

1. Containers, which are essentially truck trailers that can be detached from chassis and hoisted aboard a ship fully loaded, can be "stuffed" (loaded) or "stripped" (unloaded) either on or off the pier. In negotiating the Rules on Containers, the ILA claimed the stuffing and stripping of containers as equivalent to the dockside handling of breakbulk cargo traditionally performed by longshoremen. Although agreeing not to demand that all containers be stuffed and stripped at the dock, the ILA sought to end the transfer of such work to off-pier freight consolidation facilities that operate with non-ILA labor. The adopted Rules therefore provide that if a carrier-owned or leased container is to be stuffed or stripped within 50 miles of a port by anyone other than the ultimate shipper or consignee at his own plant with his own employees, the work must be performed "only at a waterfront facility by deep-sea ILA labor" (Pet. App. 83a). The Rules also prohibit the carriers from furnishing containers to consolidators, and impose liquidated damages of $1000 per container for any violation of the Rules (*id.* at 84a-86a). *Id.* at 6a-9a.

The ILA and maritime employers' organizations, which represented carriers, negotiated the Rules on Containers in 1968, but the parties were not able to enforce them consistently until 1983. The National Labor Relations Board had concluded that the Rules violated Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), and had obtained injunctions against implementation of the collectively bargained Rules. See *Pascarell* v. *New York Shipping Ass'n*, 650 F.2d 19 (3d Cir.), cert. denied, 454 U.S. 832 (1981). The ILA and carriers, however, did enforce the Rules for several months in 1981 after this Court's

decision in *ILA I*.[2] As a result, a number of shippers and freight handlers filed complaints against the carriers with the Commission. Those complaints alleged that the carriers, by implementing the Rules, had violated the Shipping Acts. Pet. App. 8a-14a.

2. The Commission responded to those complaints by opening Docket No. 81-11, "*50 Mile Container Rules*" – *Implementation by Ocean Common Carriers Serving U.S. Atlantic and Gulf Coast Ports,* "an investigation naming over 140 carriers as respondents" (Pet. App. 14a). The ILA intervened in order to support the carriers and to defend the implementation of the Rules. An administrative law judge (ALJ) held a lengthy evidentiary hearing, which included testimony regarding labor factors that allegedly justified the Rules. *Id.* at 14a-16a, 225a-226a, 241a-242a.[3]

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[2] Carriers had incorporated those Rules into their tariffs filed with the Commission. The Rules therefore became part of the carriers' terms of contract with cargo shippers and others. Pet. App. 73a.

[3] In 1978, before the Court's decision in *ILA I*, the Commission had an occasion to review the validity of the Rules on Containers under the Shipping Acts. In holding that the Rules, as incorporated in two common carriers' tariffs violated the Shipping Acts, the Commission stated that it did "not view the impact of the National Labor Relations Act as permitting a common carrier to disregard entirely its statutory obligations [under the Shipping Acts] when conducting and resolving labor/management negotiations." *Sea-Land Serv., Inc. and Gulf Puerto Rico Lines, Inc. – Proposed Rules on Containers (Sea Land),* 21 F.M.C. 1, 4.

In *Council of North Atlantic Shipping Ass'ns* v. *FMC*, 672 F.2d 171 (D.C. Cir.), cert. denied, 459 U.S. 830 (1982) (*CONASA*), the court of appeals upheld the Commission's exercise of jurisdiction over the carriers' tariffs incorporating the Rules on Containers. Because petitioners in that case had not briefed the Commission's holding that the tariffs violated the Shipping Acts, the court of appeals declined to reach that issue. 672 F.2d at 179 & n.67. The court of appeals nevertheless remanded the case to the Commission because, during the four years the appeal had been pending, the Court had decided *FMC* v.

Addressing the proper reconciliation of federal labor policy with the requirements of the Shipping Acts, the ALJ concluded (*id.* at 242a) that

> [t]he problem reduces itself to one of how far the ILA may go in its work preservation efforts before it impermissibly intrudes upon the rights of [others] to conduct their business free of any discrimination or prejudice resulting from the efforts of the ILA. The answer lies in balancing the harm done to [others] against the benefits derived by the ILA.

Finding that the record contained insufficient evidence that the Rules on Containers "had any measurable [financial] impact upon [shippers' and freight handlers'] businesses" (*id.* at 243a), the ALJ concluded that the Rules do not violate the Shipping Acts (*id.* at 262a-263a).

3. The Commission reversed, holding that the carriers' tariffs implementing the Rules on Containers are "unreasonable and unjustly discriminatory and therefore violate

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Pacific Maritime Ass'n, 435 U.S. 40 (1978), and *ILA I*, and the court of appeals considered that "[i]n the interests of justice, the [Commission] should have the opportunity to reconsider its previous determination in light of these two decisions" (672 F.2d at 189).

On remand from the court of appeals, the Commission later expanded its investigation to include Docket No. 81-11, and also modified its position regarding the presentation and consideration of labor factors. The Commission made clear that " 'the parties may present evidence and otherwise address the nature and extent of any labor policy consideration which might affect the lawfulness of the Container Rules under the sections of the Shipping Acts here at issue and the remedy to be applied for any violations of such sections . . .' " (Pet. App. 144a (quoting *"50 Mile Container Rules"—Implementation by Ocean Common Carriers Serving U.S. Atlantic and Gulf Coast Ports*, 21 Shipping Reg. (P & F) 544, 846 (1982)). Despite the Commission's expansion of its investigation in Docket No. 81-11, and the lapse of the collective bargaining agreement at issue in the original *CONASA* docket, the court of appeals vacated the Commission's dismissal of that proceeding. That case remains pending before the Commission. Pet. App. 142a-146a, 228a.

the [Shipping Acts]" (Pet. App. 73a-74a).[4]

a. The Commission first addressed the relevance of labor factors to the tariffs' validity under the Shipping Acts. The Commission initially concluded that Congress, in enacting the "tariff matter" exception of the Shipping Act of 1984, Pub. L. No. 98-237, 98 Stat. 72 (to be codified at 46 U.S.C. App. 1704(e)), which otherwise removed maritime labor agreements from the Commission's jurisdiction, had intended "that the Commission should not attempt to weigh 'labor considerations' in deciding the lawfulness of a 'tariff matter' " (Pet. App. 129a). Alternatively, the Commission rejected the argument that labor agreements, such as the Rules on Containers, are factors in determining whether tariffs are reasonable under the Shipping Acts. Applying case law under the Interstate Commerce Act holding that common carriers are not "excused from their statutory obligations on the basis of collective bargaining agreements with their employees" (*id.* at 163a), the Commission declined to consider a labor agreement as an element of reasonableness because that would permit a carrier voluntarily to bargain away statutory common carrier obligations (*id.* at 163a-164a).

In a similar vein, the Commission rejected the ALJ's proposed standard of weighing the benefits of the labor agreement against the economic harms to shipping. That unprecedented standard "would require the Commission to make findings of fact outside its area of expertise and to engage in investigations contrary to the policies of the [Maritime Labor Agreements Act]" (Pet. App. 168a). In

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[4] In an earlier interim report, the Commission concluded that it had jurisdiction over the carriers' tariffs incorporating the Rules on Containers. *"50 Mile Container Rules" – Implementation by Ocean Common Carriers Serving U.S. Atlantic and Gulf Coast Ports*, 21 Shipping Reg. (P & F) 544 (1982); see Pet. App. 136a-138a.

light of the "elemental differences between the national policies represented by the Shipping Acts and the labor laws," the Commission concluded that "any comparison of labor benefits and Shipping Act harm [was] at bottom an illogical and intellectually untenable exercise" (*id.* at 169a).

Finally, the Commission acknowledged its duty to "attempt to reconcile conflicting federal statutes in a manner that gives effect to both" (Pet. App. 171a). The Commission concluded (*ibid.* (footnote omitted)), however, that

> because it is clear that the National Labor Relations Act does not apply to the case before the Commission in either its terms or its underlying policies, there exists only, to borrow from conflicts of law terminology, a "false conflict" that the [Commission] is not obliged to resolve by attempting to blend the two bodies of law.

The Commission thus remained "convinced that there is no reasonable or feasible methodology by which we can seek to accommodate 'labor interests' without abandoning our fundamental Shipping Act obligations" (*id.* at 171a-172a). Accordingly, the Commission held that the tariffs incorporating the Rules on Containers would be "judged according to Shipping Act standards normally applicable to such tariffs" (*id.* at 172a). Following *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156 (1962), the Commission agreed to apply labor factors in devising an appropriate remedy for Shipping Acts violations (Pet. App. 172a).[5]

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[5] As the Commission explained (Pet. App. 75a):

> We believe that our responsibility to take "labor considerations" into account is limited to ensuring that an appropriate remedy for violations of the Shipping Acts is drawn no more broadly than necessary, so as to avoid any unwarranted impact on the legitimate collective bargaining interests of the carriers and the union.

b. Reviewing the evidence in the record, the Commission found that "the Rules on Containers place restrictions on the ability of defined classes of shippers to utilize the full range of services offered by off-pier * * * consolidators, warehousemen and freight forwarders" (Pet. App. 185a). The Commission further found that those restrictions are "not justified by transportation circumstances properly cognizable under the Shipping Acts and are arbitrary and unfair" (*ibid.*). In sum, the Commission held that the Rules "create unreasonable disadvantages to shippers within the 50-mile zone who wish to employ their off-pier cargo facilities and to companies operating such facilities, in violation of [the Shipping Acts]" (*ibid.*).

Turning to the appropriate remedy, the Commission ordered carriers to "cease and desist" from publishing the Rules on Container in tariffs and from enforcing the Rules. The Commission delayed for 90 days the effective date of its order "in order to give the carriers a reasonable amount of time to conform their collective bargaining arrangements with the requirements of the shipping laws" (Pet. App. 75a). As the Commission explained, that remedy "serves the public interest and will avoid any unnecessary disruption of the collective bargaining process by giving the parties ample time to accommodate the ILA's interests in some manner other than the present Rules on Containers" (*id.* at 192a).

4. The court of appeals denied the petitions for review, holding that the Commission properly considered labor policies only at the remedial phase of the proceeding under the Shipping Acts.[6] The court of appeals first re-

[6] The court of appeals also upheld the Commission's jurisdiction over the carriers' tariffs incorporating the Rules on Containers (Pet. App. 17a-30a). Furthermore, the court of appeals affirmed the Commission's ruling that, when only transportation conditions are considered, the tariffs are unreasonable and discriminatory under the

viewed prior decisions construing the Shipping Acts, including *FMC* v. *Pacific Maritime Ass'n*, 435 U.S. 40 (1978),[7] and rejected petitioners' argument that those decisions required the Commission to consider labor factors when assessing the validity of the carriers' tariffs (Pet. App. 32a-37a). Decisions such as *Pacific Maritime Ass'n*, in the court of appeals' view, offered little guidance in determining the relevance of labor factors to the Commission's review of carriers' tariffs.[8]

Turning to the interplay between the Shipping Acts and federal labor laws, the court of appeals agreed with the Commission that this case presented a " 'false conflict' " because the Commission's decision "in no way undermined rights guaranteed in or the policies underlying the labor laws" (Pet. App. 57a). The National Labor Relations Act promotes the collective bargaining process and requires negotiation over such matters as work preservation. Federal labor laws, however, do not require employers to accede to union demands for work preservation and do not "guarantee [employees] a substantive right to preserve * * * work" (*id.* at 58a). The court of appeals thus pointed out that "[i]t is not the national labor policy to allow otherwise unlawful activity merely because an employer

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Shipping Acts (*id.* at 30a-31a). Petitioners do not seek review of those aspects of the court of appeals' judgment.

[7] In *FMC* v. *Pacific Maritime Ass'n*, 435 U.S. 40, 50 (1978), the Court held that "national labor policy" did not require exempting collective bargaining agreements from the filing requirements of Section 15 of the Shipping Act, 1916, 46 U.S.C. 814, but that the Commission, in deference to that policy, may exempt certain collective bargaining agreements from those requirements.

[8] The court of appeals similarly rejected the Commission's conclusion that Congress, in enacting the Maritime Labor Agreements Act of 1980, intended to foreclose altogether the Commission's consideration of labor factors (Pet. App. 37a-40a).

and a union have agreed to it in mandatory collective bargaining" (*ibid.*). In other words, the Commission's requiring adherence to the employers' common carrier obligations under the Shipping Acts "does not nullify the rights of the ILA or the carriers under the [National Labor Relations Act]" (*ibid.*).

Finally, the court of appeals rejected petitioners' contention that the Shipping Acts incorporate " 'labor factors' " in the calculus whether carrier practices are unreasonable or discriminatory (Pet. App. 60a). The Shipping Acts primarily protect shippers against discriminatory practices, and courts have construed parallel provisions of the Interstate Commerce Act to preclude carriers from using labor agreements to justify such practices. In light of that overarching statutory objective, together with the accepted practice under the Interstate Commerce Act, the court of appeals concluded that the Commission's refusal to consider labor policy here was reasonable. *Id.* at 60a-62a.

ARGUMENT

The decision of the court of appeals is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioners (Pet. 9-11), joined by respondent West Gulf Maritime Association (Br. 10-12, 16-19), principally contend that the Commission, by striking down the carriers' practices under the Shipping Acts, has impermissibly undermined the longshoremen's work preservation rights guaranteed by the National Labor Relations Act. Petitioners, however, do not (and cannot) challenge the Commission's ruling (Pet. App. 172a-189a), affirmed by the court of appeals (*id.* at 30a-31a), that the carriers' prac-

tices implementing the Rules on Containers violate the Shipping Acts, absent a mandated accommodation of federal labor policy. By their terms, the Rules on Containers require carriers to discriminate among shippers on the basis of "a proprietary financial interest (other than in the transportation or physical consolidation or deconsolidation) in the * * * cargo" (*id.* at 65a). Such discrimination would clearly violate the Interstate Commerce Act, 49 U.S.C. 1 *et seq.* (1976 ed.). *E.g., ICC* v. *Delaware, L. & W. R.R.*, 220 U.S. 235, 252-254 (1911). And, given the similar policies underlying that Act and the Shipping Acts, namely, protecting small shippers against carrier practices that favor competing larger shippers, both the Commission and the court of appeals quite correctly construed the Shipping Acts as prohibiting discrimination based upon the proprietary interest in the cargo. See *United States Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, 481 (1932).[9]

Contrary to petitioners' suggestion, the Commission need not condone violations of the Shipping Acts merely because federal labor law sanctions (but, of course, does not require) the underlying conduct. To be sure, a regulatory agency may consider employees' interests where that factor would promote the objectives of the agency's organic statute. See *NAACP* v. *FPC*, 425 U.S. 662, 666-

[9] As this Court recognized in *ICC* v. *Delaware, L. & W. R.R.*, 220 U.S. 235, 243-244 (1911), and the Commission found in this case (Pet. App. 173a-174a), freight consolidators, the parties disadvantaged by the carriers' practices under the Rules on Containers, play an indispensable role in helping shippers of small loads achieve some degree of transportation cost parity with the larger shippers. Discrimination against consolidators, therefore, will inevitably disadvantage the smaller shippers. For those reasons, respondent West Gulf Maritime Association's passing suggestion (Br. 12-13) that the Shipping Acts do not explicitly prohibit the carriers' discrimination conduct is meritless.

669 (1976); *ICC* v. *Railway Labor Executives' Ass'n,* 315 U.S. 373, 376-377 (1942); *United States* v. *Lowden,* 308 U.S. 225, 232-238 (1939). In this case, however, the carriers' practices, which the ILA defends, plainly violate the Shipping Acts and would undermine the regulatory scheme's central antidiscrimination policy if permitted to continue. Under such circumstances, the Court had made clear that an agency has no obligation to redefine its statutory requirements in order to accommodate employees' rights under federal labor law. *E.g., Burlington Truck Lines* v. *United States,* 371 U.S. 156, 166-174 (1962); *Local 1976, United Bhd. of Carpenters & Joiners* v. *NLRB,* 357 U.S. 93, 109-111 (1958).[10]

2. This Court has long recognized as "a cardinal principle of construction that * * * [w]hen there are two acts upon the same subject, the rule is to give effect to both if possible." *United States* v. *Borden Co.,* 308 U.S. 188, 198 (1939). The court of appeals correctly recognized that there is no irreconcilable conflict between the antidiscrimination provisions of the Shipping Acts and the statutory right of labor unions to bargain for work preservation agreements. Carriers can readily comply with both the Shipping Acts' prohibition against discrimination among shippers and the National Labor Relations Act's call for bargaining in good faith with employees (29 U.S.C. 158(a)(5)), because federal labor law explicitly provides

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[10] Contrary to respondent West Gulf Maritime Association's contention (Br. 10-12), the court of appeals' decision does not conflict with *Burlington Truck Lines* v. *United States,* 371 U.S. 156 (1962). In that case, the Court concluded that the Interstate Commerce Commission, in choosing a remedy for carriers' violations of the Interstate Commerce Act, should avoid creating unnecessary tension between the labor and shipping obligations of the carriers. See *id.* at 172-174. That is precisely the standard the court of appeals applied to the Commission's decision here. See Pet. App. 41a, 50-53a.

that the obligation to bargain "does not compel either party to agree to a proposal," 29 U.S.C. 158(d). In other words, if an employer may lawfully reject a union's proposal on economic grounds, he may certainly reject a proposal on legal grounds, *i.e.*, the proposal's requiring the employer to engage in unlawful conduct. See *United Mine Workers* v. *Pennington*, 381 U.S. 657, 665 (1965) (duty to bargain "does not mean that the agreement reached may disregard other laws").[11] Manifestly, the labor laws were not intended to empower private persons to amend or partially repeal other Acts of Congress by mere contractual agreement. In sum, the Commission's ruling, even if viewed as precluding parties from bargaining for work preservation agreements that would violate the Shipping Acts, will not undermine federal labor policy.

3. Finally, petitioners renew their contention (Pet. 12-15) that the Commission must consider the union's interest in work preservation in determining the "reasonableness" of the carriers' tariffs under the Shipping Acts. As the Court has observed, the use of phrases like "just and reasonable" and "public interest" in regulatory statutes "is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation" (*NAACP* v. *FPC*, 425 U.S. at 669). Ultimately, the agency's duties derive from its organic statute and "an agency's general duty to enforce the public interest does not require [the agency] to

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[11] Petitioners mistakenly rely (Pet. 10) on cases such as *Sheet Metal Workers Int'l Ass'n, Local 223* v. *NLRB*, 498 F.2d 687, 697 (D.C. Cir. 1974), and *Canada Dry Corp.* v. *NLRB*, 421 F.2d 907, 910 (6th Cir. 1974). In those decisions, the court of appeals treated the legality of work preservation agreements solely under the National Labor Relations Act. The courts had no occasion to consider the legality of such agreements under other statutory schemes and did not at all suggest that labor agreements need not comply with other laws.

assume responsibility for enforcing legislation that is not directed at the agency * * *." *Community Television* v. *Gottfried*, 459 U.S. 498, 510-511 n.17 (1983).

As the court of appeals recognized, the Shipping Acts primarily protect shippers against discriminatory practices (Pet. App. 60a). An agency may not "abandon an independent inquiry into the requirements of its own statute and mechanically accept standards elaborated by another agency under a different statute for wholly different purposes." *Local 1976, United Bhd. of Carpenters & Joiners* v. *NLRB*, 357 U.S. at 111. Here, the Commission reasonably concluded that labor interests should not be considered in reviewing the carriers' actions under the Shipping Acts because to do so would effectively permit a carrier voluntarily to bargain away statutory common carrier obligations (Pet. App. 163a-164a). The court of appeals thus correctly upheld the Commission's refusal to "abandon[ ] [its] fundamental Shipping Act obligations" (Pet. App. 171a-172a).[12]

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[12] The cases cited by respondent West Gulf Maritime Association (Br. 16 n.17) are not to the contrary. Those decisions involved traditional transportation considerations such as port discrimination and the carrier's right to recover for increased costs. See Pet. App. 163a-164a. None of those decisions considered labor factors in determining whether practices were lawful under Shipping Acts.

Similarly, respondent West Gulf Maritime Association (Br. 14-15) mistakenly contends that the court of appeals' decision conflicts with *FMC* v. *Pacific Maritime Ass'n*, 435 U.S. 40 (1978). In that case, the Court held that "national labor policy" did not require exempting collective bargaining agreements from the filing requirements of Section 15 of the Shipping Act, 1916, 46 U.S.C. 814, but that the Commission, in deference to the policy, may exempt certain collective bargaining agreements from those requirements. 435 U.S. at 53-60, 63. In resolving the issue surrounding the Commission's jurisdiction, however, the Court had no occasion to address whether the Commission should apply labor factors in determining the existence of substantive violations of the Shipping Acts.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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